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THE
PACIFIC REPORTER,

VOLUME 7,

CONTAINING

ALL THE DECISIONS OF THE SUPREME COURTS

OF

California, Colorado, Kansas, Oregon, Nevada, Arizona,
Idaho, Montana, Washington, Wyoming,
Utah, and New Mexico.

JUNE 4—OCTOBER 8, 1885.

SAINT PAUL:
WEST PUBLISHING COMPANY.
1885.

KF
135
P32

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THE
Pacific Reporter.

VOLUME VII.

SUPREME COURT OF CALIFORNIA.

(67 Cal. 21)

PEOPLE v. PLATT. (No. 20,045.)

Filed May 14, 1885.

1. PERJURY—MISDEMEANOR—OMISSION OF PROPERTY FROM INSOLVENT'S SCHEDULE, AND FALSE VERIFICATION.

Where a petitioner in insolvency willfully omits from his schedule any of his property, and then verifies his petition, schedule, and inventory, as prescribed by law, he is guilty of perjury, notwithstanding the California insolvency act provides that an omission of property from an insolvent's schedule shall constitute a misdemeanor. The general law regarding perjury is not inconsistent with such provision of the insolvency act, and is not in that regard repealed by it; the false verification being the act which constitutes the perjury, and not the omission of the property, which, before the said insolvent law, constituted no offense, but is by such act made a misdemeanor.

2. CONSTRUCTION OF STATUTES—REPEALS BY IMPLICATION.

The construction of statutes in respect to repeals by implication is that the earliest act remains in force unless the two are manifestly inconsistent with and repugnant to each other. It is necessary to the implication of a repeal that the objects of the two statutes be the same. If they are not, both will stand, though they refer to the same subject.

3. INFORMATION FOR FELONY—SUFFICIENCY OF ALLEGATION AND DESCRIPTION OF PROPERTY.

An allegation in an information that the defendant "willfully concealed a large amount of property, consisting among other things of diamonds, watches, jewelry, money, and other personal effects belonging to him and to his estate," is a sufficient description of such property on a charge of perjury in having willfully sworn falsely to an inventory in insolvency, from which he omitted said property.

Department 2. Appeal from the superior court of Los Angeles county.

The Attorney General, for appellant.

Howard & Roberts and *J. F. Godfrey*, for respondents.

SHARPSTEIN, J. It seems to be conceded that a petitioner in insolvency who should willfully omit from his schedule any of his property, and then verify his petition, schedule, and inventory in the form and

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manner prescribed by law, would be guilty of perjury, were it not for a provision in the insolvent act which makes such omission a misdemeanor. And the respondent insists that the latter act "creates a misdemeanor of what before was a felony," and that "the old law is gone by reason of the repugnance, and the offender can only be indicted under the new." But the latter act does not make the verification of a schedule by a petitioner, from which he has willfully omitted some of his property, a misdemeanor. If he "fraudulently or designedly omits from his schedule any property or effects whatsoever, * * * he shall be deemed guilty of a misdemeanor." We cannot discover any repugnancy or inconsistency between that and a statute which makes the verification of a false schedule, by a petitioner who knows it to be false, a felony. "The invariable rule of construction in respect to the repealing of statutes by implication, is that the earliest act remains in force, unless the two are manifestly inconsistent with and repugnant to each other." *Bowen v. Lease*, 5 Hill, 221. "It is necessary, to the implication of a repeal, that the objects of the two statutes be the same. If they are not, both will stand, though they may refer to the same subject." *U. S. v. Clafin*, 97 U. S. 546. Here the objects of the two statutes are not the same. And, as was said in *Rawson v. Rawson*, 52 Ill. 62:

"The acts are not upon the same subject, and if the rule be, as it undoubtedly is, that a subsequent act upon the same subject will not be held to repeal a former act by implication, unless the new act contains provisions contrary to or irreconcilable with those of the former act, with much more force and propriety may it be argued that a subsequent act, not on the same subject, shall not be construed to repeal a former act by mere implication."

We are unable to find anything in the insolvent act which indicates that it was the intention of the legislature to make that a misdemeanor which was a felony before. That which it declares shall be deemed to be a misdemeanor was neither a misdemeanor nor a felony before. The allegation that the defendant "willfully concealed a large amount of property, consisting, among other things, of diamonds, watches, jewelry, money, and other personal effects belonging to him and his estate," seems to us to be sufficiently definite and certain. The defendant swore that his schedule and inventory contained a full, perfect, and true discovery of all his estate, real, personal, and mixed, goods and effects. The charge is that he willfully omitted from his schedule the property above mentioned. A minute description of the property might be impossible; and, if exacted, might defeat the ends of justice, as a variance between the proof and allegation would be fatal. We think the defendant is sufficiently apprised by the information of the charge which he must be prepared to meet on the trial. If innocent, there is no more danger of his being convicted than there would be if the property had been described with the greatest minuteness, although his chance of escape, if guilty, might have been much better if it had been so described.

Judgment reversed, with directions to the court below to overrule the demurrer to the information, with leave to the defendant to plead thereto as he shall be advised.

We concur: THORNTON, J.; MYRICK, J.

PEOPLE v. BERMAN. (No. 20,044.)

Filed May 14, 1885.

JUDGMENT REVERSED.

On authority of *People v. Platt, ante*, 1, judgment reversed, with directions to overrule the demurrer, and allow the defendant to plead.

Department 2. Appeal from the superior court of Los Angeles county. The facts and points involved in this case were the same as in *People v. Platt, ante*, 1.

The Attorney General, for appellant.

J. F. Godfrey, for respondent.

By THE COURT. On the authority of *People v. Platt, ante*, 1, this day filed, judgment reversed, with directions to the court below to overrule the demurrer to the information, with leave to the defendant to plead thereto as he shall be advised.

(67 Cal. 24)

HALEY v. HALEY. (No. 9,917.)

Filed May 14, 1885.

DIVORCE—TESTIMONY OF PARTIES—CORROBORATIVE TESTIMONY.

Under the California Civil Code, § 130, no divorce will be granted on the uncorroborated testimony of the parties; and in a suit for divorce for extreme cruelty, plaintiff's testimony as to the acts of cruelty which caused her to leave her husband's home and seek shelter elsewhere, is not corroborated by the only other evidence offered in the case,—that of the plaintiff's attorney,—as to a confidential conversation with defendant, at plaintiff's instance, in regard to a settlement of the case, and the evidence of a person who overheard such conversation; none of such evidence tending to prove the acts of cruelty to plaintiff which she testified caused her to leave defendant's house.

Department 2. Appeal from the superior court of Los Angeles county.

Bicknell & White, for appellant.

John T. Godfrey, for respondent.

MYRICK, J. This is an action for divorce on the ground of extreme cruelty. The plaintiff alleged the marriage of herself and defendant on the seventh of June, 1884, and that the defendant had since then been guilty of cruel and inhuman treatment of her, in that he had accused her of having committed adultery, and that in consequence of such accusations her mental suffering was so great that she became physically ill and her health endangered, and she could not, with safety to her mental or physical health, continue to live with him, and for that reason she was obliged to leave his home and seek shelter elsewhere.

The plaintiff was examined as a witness in her own behalf, and her testimony tended to fully sustain the allegations of the complaint. According to section 130 of the Civil Code no divorce can be granted

upon the uncorroborated testimony of the parties. It was therefore necessary for the plaintiff to produce evidence other than her own testimony as to the truth of her allegations. This was attempted to be accomplished in the following way: After she separated from the defendant she consulted with an attorney in reference to her grievances. The attorney was friendly to the defendant, and told her he would see Haley and talk with him, and ask him to get an attorney, (naming him,) and perhaps they (the attorneys) could arrange it so, if the plaintiff and defendant could not agree, a divorce could be got with little expense, scandal, and notoriety. Plaintiff's attorney thereupon had an interview with defendant; and subsequently another interview occurred between the same parties, during a portion of which another person was casually present and heard some of the conversation.

The plaintiff's attorney was examined as a witness on her behalf, as was the other person, and it is claimed on behalf of plaintiff that the testimony of these witnesses corroborated the testimony of plaintiff. It may be here stated that, independent of the plaintiff and these two witnesses, no evidence was given tending to prove the allegations of extreme cruelty. We are of opinion that the testimony of plaintiff's attorney and of the other person did not in any material respect corroborate the testimony of the plaintiff in regard to the averments of the complaint. The statements of the defendant, as testified to by these witnesses, were made in conversations of a friendly and confidential character, sought by plaintiff's attorney with her knowledge, and with a view to settle matters between the parties. There is no evidence that they were made with any wanton or cruel intent, or that they produced any effect upon her; they were merely statements of what he professed to believe to be true, together with his reasons for so believing. There was no evidence, other than that of plaintiff, of any accusations made by defendant before she left his house, nor that she left his house, or underwent any suffering in consequence of any such accusations. We do not think that the testimony of the plaintiff was corroborated.

Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

(67 Cal. 27)

TROJAN MIN. CO. v. FIREMAN'S INS. CO. OF BALTIMORE. (No. 9,881.)

Filed May 14, 1885.

FIRE INSURANCE POLICY—PROVISION IN—PLEADING—FINDINGS.

Where, in an action on an insurance policy, (a clause in the policy providing that the insured should maintain a watchman in and upon the insured premises day and night, whenever the works thereon should be idle,) the complaint alleged that plaintiff, the insured, did so maintain a watchman in and upon said premises day and night, and that he was on the premises at the time of the fire which caused the damage sued for, an answer denying that during

all the time the works were idle, said plaintiff had a watchman upon the insured premises, and alleging that for two hours prior to said fire there had been no watchman upon said premises, is a plain and unequivocal denial of the complainant's allegation, and forms a clear and distinct issue, and a finding that at the time of such fire plaintiff's watchman was not on the insured premises, but was sleeping in a building belonging to plaintiff, which was 100 feet away and across the road, and not part of the insured premises, but that a watch-dog had been left upon such premises, is a finding responsive to the issue, and upon such finding, under the above provision in the policy, the plaintiff is not entitled to recover.

Department 2. Appeal from the superior court of the city and county of San Francisco.

Geo. W. Tyler, for appellant.

Fox & Kellogg and *T. C. Van Ness*, for respondent.

BY THE COURT. Action on a fire insurance policy. The policy contained the following clause:

"It is agreed and understood that during such times as the above works are idle, a watchman shall be employed by the assured, to be in and upon the premises day and night."

The allegation in the complaint on that subject is as follows:

"That at the time of such fire, and for some time prior thereto, the works of said corporation, so assured as aforesaid, were idle, but during all said time a watchman was employed by plaintiff in and upon the premises day and night, and said watchman was upon said premises at the time of said loss and damage as aforesaid."

The denial is as follows:

"And defendant denies and says it is not true, as alleged in said complaint, or at all, that during all the time the works of said corporation were idle, as alleged in said complaint, a watchman was in and upon the premises day and night."

In the answer there is also an allegation as follows:

"That, at times said fire occurred, and for more than two hours prior thereto, no watchman was in and upon the premises upon which said works, insured as aforesaid, were situated."

It is contended by plaintiff that the allegation of the complaint as to the watchman is not denied. The complaint states that a watchman was employed by plaintiff *in and upon* the premises day and night, and *was upon* the premises at the time of the fire. The answer denies that a watchman was in and upon the premises day and night, and avers that at the time of the fire, and for more than two hours prior thereto, no watchman was in and upon the premises. The denial seems to us to be plain and unequivocal. The appellant urges that by the terms of the policy it was to *employ* a watchman to be in and upon the premises, and if the watchman stayed away, the insurer is not exonerated, under section 2629, Civil Code. If there is any difference in the meaning of the words used in the policy and those used by the pleader, the latter seems to have attached to them the meaning that the watchman employed by the plaintiff *was in and upon* the premises day and night, (not that he was employed to be there and neglected his employment,) and, moreover, the plaintiff alleged

that he was there at the time of the fire; and thus the issue was presented as to the fact whether or not the watchman was there. On this subject the court found as follows:

"That, during the time that said premises were so idle and unoccupied, plaintiff failed to and did not keep a watchman in and upon, or in or upon, said insured premises day and night; that no watchman was in and upon, or in or upon, said insured premises nightly from and after the hour of 10 o'clock, or thereabouts, until an early hour of each morning thereafter; that no watchman was in and upon, or in or upon, said insured premises between the hours of 10 o'clock P. M., or thereabouts, on the evening preceding the fire alleged in the complaint of plaintiff and the hour when said fire occurred; that a watchman employed by plaintiff to watch the insured premises slept nightly in a small building located across the road from said insured premises, and from 100 to 120 feet, or thereabouts, distant therefrom; that said building was owned by plaintiff, but was situate upon ground not owned by plaintiff; that the watchman so employed as aforesaid kept a watchdog in the insured building, which had the whole range of the building on the inside, and was accustomed to bark loudly when any stranger approached said building."

The evidence is not before us. The findings respond to the issues, and clearly show that plaintiff was not entitled to recover.

It is unnecessary to notice the other points presented, as the above disposes of the case.

The judgment is affirmed.

TROJAN MIN. CO. v. CITIZENS' INS. CO. OF MISSOURI. (No. 8,973.)

Filed May 14, 1885.

JUDGMENT AFFIRMED.

On authority of *Trojan Min. Co. v. Fireman's Ins. Co.*, ante, 4, judgment affirmed.

Department 2. Appeal from the superior court of the city and county of San Francisco. The facts and points involved in this case are the same as in *Trojan Min. Co. v. Fireman's Ins. Co.*, ante, 4.

Geo. W. Tyler, for appellant.

Fox & Kellogg and *T. C. Van Ness*, for respondent.

By THE COURT. Upon the authority of *Trojan Min. Co. v. Fireman's Ins. Co.*, ante, 4, judgment affirmed.

TROJAN MIN. CO. v. AMERICAN CENT. INS. CO. OF ST. LOUIS. (No. 9,882.)

Filed May 14, 1885

JUDGMENT AFFIRMED.

On authority of *Trojan Min. Co. v. Fireman's Ins. Co.*, ante, 4, judgment affirmed.

Department 2. Appeal from the superior court of the city and county of San Francisco. The facts and points involved in this case are the same as in *Trojan Min. Co. v. Fireman's Ins. Co.*, ante, 4.

Geo. W. Tyler, for appellant.

Fox & Kellogg and *T. C. Van Ness*, for respondent.

By THE COURT. Upon the authority of *Trojan Min. Co. v. Fireman's Ins. Co.*, ante, 4, judgment affirmed.

(57 Cal. 29)

STECHAN v. RORABACK and others. (No. 8,782.)

Filed May 15, 1885.

UNDERTAKING FOR ARREST, ACTION ON—EFFECT OF APPEAL.

Where, in an action in a justice's court, an order of arrest for the defendant has been issued, and an undertaking given therein, and on the trial the arrest is held to have been wrongful and the defendant is discharged, and the plaintiff appeals from such judgment, no action is maintainable on such undertaking until the appeal is determined.

Department 2. Appeal from the superior court of the city and county of San Francisco.

W. H. Allen, J. W. Harding, and P. B. Ladd, for appellant.

Baggett & Platt, for respondent.

BY THE COURT. The defendant Roraback, commenced an action against Stechan in a justice's court, and procured an order for his arrest. In procuring such order, Stechan gave an undertaking, with the other defendants herein as sureties. On the trial of the action, the justice held the arrest to have been wrongful and without cause, and discharged Stechan. This action is on the undertaking. The defendants herein, in their answer, averred that, after the judgment in the justice's court, Roraback, plaintiff therein, appealed from such judgment to the superior court, and that such appeal was still untried and undetermined. This portion of the answer was demurred to, and the demurrer sustained. We are of opinion that this ruling was error. On the appeal the whole case was for hearing and determination, including the question whether or not the arrest was wrongful or without sufficient cause; and until such determination it could not be known whether liability on the undertaking had been incurred.

Judgment and order reversed, and cause remanded, with instructions to overrule plaintiff's demurrer to defendant's answer in the particular above noted. The demurrer was properly sustained as to the other ground therein stated.

(2 Cal. Unrep. 473)

SHUFFLETON v. HILL. (No. 8,650.)

Filed May 15, 1885.

MECHANIC'S LIEN—EFFECT OF ADVANCEMENTS TO DEFEAT LIEN.

A mechanic having a lien on logs cut by him, does not lose it because of advancements made on the property by another, under a contract of purchase, but he is entitled to enforce his lien against such property.

Department 2. Appeal from the superior court of Humboldt county. Action by plaintiff to enforce his lien for labor on logs cut by him, and owned by the defendant.

S. M. Buck, for appellant.

W. H. Brumfield and James Hanna, for respondent.

BY THE COURT. We are of opinion that, under the contract and lease, Greenlaw, in the first instance, and Hill, as his successor, owned

the logs until delivery in the boom at the mill. Such being the case, plaintiff was entitled to an enforcement of his lien, irrespective of advances made by Vance to Hill.

Judgment reversed, and cause remanded, with instructions to enter judgment for plaintiff.

(67 Cal. 31)

PEOPLE v. WONG AH YOU. (No. 20,078.)

Filed May 16, 1885.

GRAND LARCENY—CONVICTION—SUFFICIENCY OF EVIDENCE TO SUPPORT.

In a prosecution for grand larceny, proof that defendant had access to the house and place where the missing property was kept, together with a false statement regarding a matter in no way connected with the crime, is not sufficient evidence to sustain a conviction.

Department 2. Appeal from the superior court of the city and county of San Francisco.

C. B. Darwin, for appellant.

E. C. Marshall, for respondent.

SHARPSTEIN, J. Beyond the fact that the defendant had access to the house and to the rooms in which the missing money was kept, the only circumstance which militates in any degree against him is his statement that when he returned from Sunday school he found the door through which he entered the house open, while a witness who was in the house at the time testifies that the defendant unlocked the door before entering. There is no evidence that the stolen property or any portion of it was ever in the possession of the defendant, or that he knew where it was kept. The evidence is that none of it has ever been discovered since it was first missed. Therefore, the statement of the defendant that he found the door open was not made for the purpose of explaining his possession of the stolen property. The most that can be claimed is, that he made it for the purpose of averting suspicion from himself. That he would naturally desire to do, whether guilty or innocent. It is not claimed that his unlocking the door had any connection with the alleged crime. Nor is it claimed that he had not a right to unlock it, or that he had not been furnished with a key for that purpose. He had been a servant in the house for a period of 27 months, and seems to have been very much trusted.

We think that the bare circumstance of his having made a false statement in regard to a matter in no way connected with the crime of which he is accused, is insufficient to justify the verdict, and for that reason his motion for a new trial should have been granted.

Judgment and order reversed, and cause remanded for a new trial.

We concur: **MYRICK, J.**; **THORNTON, J.**

SUPREME COURT OF COLORADO.

(8 Colo. 252)

CLELLAND, impleaded, etc., v. TANNER.

Filed May 8, 1885.

PRACTICE—APPEALS FROM JUDGMENT RENDERED DURING VACATION.

An appeal cannot be taken from a judgment rendered during vacation, according to the laws of Colorado now existing.

Error to district court of Fremont county.

Thatcher & Gast, for appellant.

Bentley & Vaile, for appellee.

BECK, C. J. The only error assigned is to the action of the district court in dismissing an appeal to that court from a money judgment entered up in vacation in the county court.

Counsel for plaintiff in error contend that although no appeal was prayed, and no time fixed by the court for the giving of an appeal-bond, yet appeals lie from judgments entered in vacation, as well as from those entered in term time, and a good and sufficient appeal-bond having been executed by the plaintiff in error, which was duly approved and filed by the judge of the county court, and the papers having been transmitted to the district court, it was error to dismiss the appeal on the ground of want of jurisdiction to entertain it.

If the proposition be admitted that the statute authorizes an appeal from judgments entered up in vacation, still the right is purely statutory, and to be available the terms upon which the right is given must be complied with. These terms, as prescribed by the act of 1877, are, "the party desiring such appeal shall, within a reasonable time, to be fixed by the court, give good and sufficient bond with one or more sureties, to be approved by the judge or clerk of said court. * * *"

We held, in *Gruner v. Moore*, 6 Colo. 526, that the order fixing the time within which the appeal-bond might be filed, could not be made in vacation, for the reason that it required the judicial action of the court to make such order. In this present case the plaintiff in error tendered his appeal-bond 28 days after the entry of judgment, assuming that the law allowed him that time to prepare the same without an order of court. Where a statutory right rests upon conditions thereto attached, such conditions cannot be arbitrarily dispensed with and advantage taken of the right at the same time, and where the statute clearly covers all cases, it is no answer to say that in a given case the conditions required are inconvenient and useless. Until the statute is modified its terms must be complied with.

Judgment affirmed.

(8 Colo. 286)

SMITH v. STOKER.

Filed May 8, 1885.

EVIDENCE—DEED OF ASSIGNMENT—SUBSTITUTION OF NEW SCHEDULE FOR OLD AFTER EXECUTION.

A deed of assignment for the benefit of creditors should not be ruled out of evidence on account of a substitution of a new schedule, after the execution of the instrument, in lieu of the schedule attached to the deed when executed, if it appear that such substitution was made in good faith, and effected no material change in the deed, but simply gave a more accurate statement of the values given the assets upon completion of the invoice.

Appeal from district court of Pueblo county.

Decker & Yonley, for appellant.

Chas. E. Gast and *J. M. Waldron*, for appellee.

HELM, J. Longsdorf, Holmes & Co., a mercantile firm in Pueblo, made an assignment of their stock of merchandise, fixtures, etc., to appellee for the equal benefit of all of the firm creditors. Appellee assumed possession of the property under the deed of assignment, and proceeded to retail the goods at private sale in pursuance of the conditions of the trust. About 20 days thereafter, appellant, the United States marshal, levied a writ of attachment on three-quarters of the stock, the writ issuing against Longsdorf, Holmes & Co. at the suit of one of their creditors. At the expiration of 11 or 12 days after the levy, appellee, as the assignee aforesaid, replevied the goods from the marshal. At the trial of the replevin suit he recovered a verdict and judgment for the possession, and also for \$2,000 as damages for the wrongful taking and detention of the merchandise. To reverse this judgment the appeal now before us is taken.

The deed of assignment contains the following description of the property assigned:

"All of the goods, wares, and merchandise of every kind, nature, and description, being and consisting of the stock of goods situated in the building heretofore occupied by said firm, on the north side of Fourth street, between Santa Fe avenue and Main street in the city of Pueblo aforesaid, and being the stock in trade of the said firm; also the fixtures in said store heretofore used in connection with the said business; also all the promissory notes, book-accounts, and other claims and evidences of indebtedness now held by and owing to the said firm,—it being intended hereby to convey and transfer all the property and assets of the said firm, of every kind, nature, and description, and wheresoever situate,—said goods and chattels, rights and credits, being more fully described and enumerated in a schedule thereof, hereto attached and marked Schedule A,—to have and to hold the same, and every part thereof in trust for the uses and purposes following: * * *

At the trial of the replevin suit it appeared by unquestioned proofs that, by direction of the assignee, the document referred to in the instrument as "Schedule A," was detached subsequent to the execution of the deed and delivery of the property, and another and different schedule attached in lieu thereof. The court received the deed of

assignment in evidence with the schedule last above-mentioned appended thereto. The principal error urged here challenges the ruling admitting this deed.

The evidence, in our judgment, does not justify the suspicion that there was actual bad faith in the transaction, on the part of either assignors or assignee. Was the detaching of the first Schedule A from the deed of assignment, and the appending of the second schedule thereto, sufficient *per se*, so far as this suit is concerned, to call for the rejection of the deed when offered in evidence.

Where there is no statute requiring a schedule, if the property be described with reasonable certainty in the deed, no schedule is necessary to the validity of an assignment. This proposition is so strongly supported by authority, as well as reason, that it may be considered *res adjudicata*. It may also be accepted as settled law that if such a deed—that is to say, one sufficiently describing the property—provides for the attachment *in futuro* of a schedule containing a more specific description, the title and right of possession pass to the assignee, though the schedule be never annexed, the intent being clear in such cases that the appending of the schedule shall not be a condition precedent to the taking effect of the deed. The instrument before us is sufficiently specific in this particular, and had no schedule been mentioned, it would have covered the property attached by the marshal. But, as it speaks of a schedule containing a more complete description of the property assigned as “hereto attached,” counsel, for appellant contend that without such schedule the deed was inoperative. They hold that such a schedule, when referred to as already attached, is a material part of the deed; that the rule, that special words in an instrument control and limit general terms there, is on the same subject,—is applicable; that the proper legal inference is that the parties did not intend the deed to take effect without the schedule; and therefore that the assignment is a special and not a general one. And they support their views with a liberal citation of authorities.

The granting clauses of the deed under consideration, as will be observed by reference thereto, contain a very complete general description of the property conveyed. The following is among the other expressions used therein:

“It being intended hereby to convey and transfer all the property and assets of the said firm of every kind, nature, and description, and wheresoever situate.”

This language, coupled with the other descriptive expressions in the deed, is stronger, as indicating the intent of the assignors to transfer *all* of their property, than that in any of the cases cited. And it is possible that we might be constrained to give it this effect regardless of the auxiliary rule of interpretation above mentioned, had no schedule been attached. But as we view the case, it is unnecessary for us to

determine this question; for, as already stated, at the time of its delivery the deed was accompanied by a schedule, "A;" and in this case we may assume that the title to the property described in the deed and schedule actually vested in the assignee.

The question upon which we are called to pass is as to the effect, upon the deed as evidence, produced by detaching the schedule, and annexing another. If we were not informed concerning the contents of the original Schedule A, the subject would be much more perplexing, because we would then have nothing but the language left in the instrument from which to determine the materiality of the change thus effected therein. But uncontradicted testimony shows that this schedule was merely an approximate estimate of values fixed upon the five different items of assets, viz., stock, fixtures, good accounts, insurance rebate, and rent. It in no way changed or affected the general description of the property given in the deed and above quoted in full. It was not a material part of the deed; in no view was it important even, except as furnishing the beneficiaries of the trust and the assignee with a clue concerning the probable proportion of the liabilities that might in the end be discharged,—a matter foreign to the sufficiency of the deed in accomplishing the purposes of the assignment. The foregoing is equally true of the substituted schedule, which is simply a more accurate statement of values given the assets upon completion of the invoice.

The proofs, upon which the foregoing conclusions as to the original schedule rest, might not have been admissible had timely objection been taken. These proofs referred to the contents of a written instrument, and a proper foundation for their admission was not laid, but part of the testimony was drawn out by appellants caused in cross-examination, and all of it was received without objection or exception.

Under the circumstances, the exchange of schedule did not materially change the contract. It did not alter the legal tenor or effect of the instrument, nor did it affect the rights or liability of any person interested therein. See cases cited in note 20, *Waring v. Smyth*, 2 Barb. Ch. 120; and also cases mentioned in note 10, *Woodworth v. Bank of America*, 10 Amer. Dec. 267.

It is proper, though perhaps not necessary, to here readvert to the fact that there is nothing else in the record indicative of bad faith in the original assignment; while the exchange of schedules is so explained as to do away with the slightest suspicion of fraud in connection therewith. It was done as soon as the invoice could be taken, before any controversy arose, and 17 days prior to the levy of the writ of attachment; the purpose being to append a more accurate valuation of assets.

The suggestion may be made that the original Schedule A containing no "description or enumeration of goods and chattels, rights and credits," but merely a general statement of values, was not what the deed called for, and therefore the deed was defective. The obvious

answer to this objection must be that it was designated and marked Schedule A, and was attached to the deed at the time of its execution; and therefore we must regard it as the identical schedule referred to by the parties, though their language descriptive thereof is somewhat inaccurate. We conclude that no error was committed in receiving the deed of assignment in evidence.

It should be remarked, in passing, that the court proposed to exclude the substituted schedule, but counsel for appellant demanded that the whole conveyance be rejected or that it be received as an entirety, including this schedule. Counsel's objection to instruction No. 1 given to the jury is more specious than real. Quoting their own language—

"The court told the jury that if the plaintiff as assignee was in the open and exclusive possession, holding the property in controversy in this action, without fraud, for the purpose of disposing of the same for the benefit of creditors, etc., then the plaintiff was the legal owner of the property."

It might be urged with reason, in view of the punctuation, that the phrase "without fraud" is not limited to the conduct of the assignee; that it relates to the whole transaction, and the jury might well understand that the assignors must also have acted without any fraudulent purpose. But if the instruction is open to the charge of ambiguity in this particular, it is cured by the clear and unequivocal language employed in the remaining instructions. The jury are repeatedly told that if there was a fraudulent intent on the part of Longsdorf and Holmes, or either of them, in making the assignment, it was void.

Counsel's objection to the sixth instruction is equally without merit. The jury are instructed that if they find for the plaintiff, "they will also find his damages sustained by reason of the taking and detention of the property; and as to this the jury are instructed that the plaintiff is entitled, as general damages, to interest on the value of said property during the time it was detained from his possession by the defendant, at the rate of ten per cent. per annum." The jury are not told, as counsel seem to contend, that they may find the damages for the taking and detention, and, in addition, interest on the value, etc. The item of interest is mentioned as one of the elements of damage produced by such taking and detention. The doctrine that in such cases interest, as general damages, is recoverable upon the value of the property wrongfully detained, was announced by this court in *Tucker v. Parks*, 7 Colo. 62, S. C. 1 PAC. REP. 427, and a rediscussion of the subject is therefore unnecessary.

There are no special circumstances connected with this case which prevent the application of the rule that the declarations of the assignor, made after the assignment and delivery of possession, in the absence of the assignee, are not admissible in evidence against the latter; there was, therefore, no error in rejecting the evidence offered to prove such declarations.

We deem a discussion of the remaining assignments of error unnecessary.

The judgment is affirmed.

(3 Colo. 257)

TOWN OF DURANGO v. PENNINGTON.

Filed April 7, 1885.

1. CONTRACTING WITH MUNICIPALITY—ULTRA VIRES.

In accepting a contract from a city or town to perform a certain work, the contractor should be careful to satisfy himself that the city in awarding such contract was acting strictly within its powers.

2. SAME—STREET GRADING—EXPENSE—TOWN—PROPERTY HOLDERS.

Under existing laws regulating the grading of streets in Durango, in cases where the expense of such work is not to be borne by the owners of adjacent property, it is not necessary for the board to advertise for bids, or for letting the work upon contract.

Appeal from county court of La Plata county.

Murkham, Patterson & Thomas and *Boyer & Caldwell*, for appellant.

M. B. Carpenter and *Hudson & Slaymaker*, for appellee.

BECK, C. J. The complaint alleges that the appellant entered into a contract with one Keegan, on or about December 13, 1881, whereby the latter party was to grade that portion of G street in the town of Durango extending from First to Second street, and to fully perform and complete the work on or before January 13, 1882; that he was to be paid for the work according to the different kinds of grading to be done, as per plans, specifications, and prices inserted. The compensation was further dependent upon the inspection, measurements, and estimates of the town engineer, and the acceptance of the appellant. Complete performance of the contract by Keegan, within the time limited, is averred; also the performance by the town engineer of his duties, and the acceptance of the work by the appellant. It is further averred that the grading amounted to the total sum of \$3,628.50, according to the terms of the contract, and the measurements and estimates of the engineer; that there has been paid thereon by the defendant the sum of \$1,878.75; and that there remains due and unpaid the sum of \$1,749.75. It was further averred that this claim had been duly assigned to the plaintiff, Pennington, before suit brought.

The answer of the defendant, so far as any question discussed by counsel is concerned, consists of a denial of all the averments of the complaint. A jury was waived and the cause tried to the court, who found the issues for the plaintiff, and gave judgment against the town for the sum of \$1,779.75, and costs.

Exceptions were reserved by the defendant to certain rulings of the court made during the progress of the trial, in relation to the admission and exclusion of evidence, and to the finding and judgment. The bill of exceptions not only fails to state that it contains all the

evidence, but states affirmatively that it contains only such portions thereof as were desired by the defendant to be inserted therein, and that the evidence produced on the trial showed full performance by Keegan of the work sued for. That portion of the evidence set out in the bill of exceptions shows performance, acceptance, and payment of about one-half of the work contracted for. There is nothing to indicate that the whole work was not completed, or that it was not performed in a manner satisfactory to the defendant. In this state of the record it will be presumed that it was completed, inspected, measured, and estimated in the manner alleged in the complaint, and accepted by the defendant.

The defense relied upon to excuse the town from payment of the balance of the contract price is that the contract is void for non-compliance with the requirements of the statute in the making thereof. The proceedings of the board of trustees in respect to the matter are set out in the bill of exceptions, and the defendant claims that they neither authorized the work to be done, nor imposed any liability on the town to pay therefor when the work was done.

On the part of plaintiff it is conceded that the contract was not valid when made, owing to a non-observance of the strict requirements of the statute. But it is claimed that the contract was afterwards duly ratified by the town, and that it thereupon became legal and binding upon the defendant according to its terms. To this position it is replied that the acts relied upon as constituting a ratification are equally defective for that purpose, as is the original transaction to constitute a valid contract. Hence that the contract sued on being invalid when made, and there being no sufficient ratification thereof afterwards, no liability thereon existed, and the judgment against the defendant was not authorized by law.

We understand the law to be well settled that when the mode of proceeding in respect to transactions of this nature is prescribed by law, or in the character of a municipal corporation, such mode must be strictly pursued by the corporation in relation to the awarding and making of contracts, or no liability is thereby incurred. The party dealing with a municipal body is bound to see to it that all mandatory provisions of the law are complied with, and if he neglects such precaution he becomes a mere volunteer and must suffer the consequences. *Zottman v. San Francisco*, 20 Cal. 96; *Brady v. The Mayor*, 20 N. Y. 312; *Murphy v. City of Louisville*, 9 Bush, 189; *Steckert v. City of East Saginaw*, 22 Mich. 104.

A contract not *ultra vires* may be ratified. The ratification, when properly made, is said to be equivalent to previous authority to make it, and operates to validate it from the time of its execution. But the ratification of an invalid contract, where an express contract is necessary to bind a municipal corporation in the first instance, and where the contract is required to be made in a specified manner, requires the observance of the same formalities and provisions necessary to

be complied with in the making of a valid contract. *McCracken v. City of San Francisco*, 16 Cal. 623; *Zottman v. San Francisco*, *supra*; *People v. Swift*, 31 Cal. 28.

It follows, from the foregoing rules of decision, that if the defendant corporation was limited by law to a specified mode of contracting indebtedness for the making of street improvements, and such mode was not observed in the awarding and making of the contract in question, nor in its subsequent ratification, that no recovery thereon can be had against the corporation. In such case it matters not that the work may have been well done, and that the defendant may have the full benefit thereof.

It is claimed that the power of the defendant in this case to contract the indebtedness mentioned in the complaint was limited to a prescribed mode by section 26 of the charter, concerning towns and cities. Gen. St. § 3324. The section is as follows:

"On the passage or adoption of every by-law or ordinance, and every resolution or order to enter into contract, by any council or board of trustees of any municipal corporation, the yeas and nays shall be called and recorded; and to pass or adopt any by-law, ordinance, or any such resolution or order, a concurrence of a majority of the whole number of members elected to the council or board of trustees shall be required. All appointments of officers by any council shall be by ballot, and the concurrence of a like majority shall be required, and the names of those who voted, and the vote each candidate received upon the vote resulting in an appointment shall be recorded."

It will be observed that this section specifies no cases wherein contracts are required to be entered into; nor does the general incorporation act require that a street improvement, the expense of which is not to be assessed on the owners of adjoining property, shall be let out upon contract. In this respect the act is wholly unlike the statutory provisions upon which the foregoing rules and decisions were predicated. In the case of *Zottman v. San Francisco*, 20 Cal. 96, the charter of the city required, among other things, the passage of an ordinance to authorize a street improvement, its publication, and that the contract for the improvement be let to the lowest bidder, after advertising for bids. In *Brady v. The Mayor*, 20 N. Y. 316, the act amending the charter of the city of New York, which was involved in that case, provided that all work to be performed for the city, which should cost more than \$250, should be subjected to public competition, and should be given out to the party who would undertake to do it for the smallest amount of money. *McDonald v. Mayor*, 68 N. Y. 25, arose under a later act. It was an action to recover the value of certain gravel and stone delivered to the city, and used in the repair of its streets; but the statute required, in such case, that a contract for the purchase of the materials be entered into by the appropriate head of department, upon sealed bids or proposals, made in compliance with public notice advertised.

The course pursued by the defendant in this case was authorized, although not required, by our statute, and under the general power to

contract contained in section 26, a valid contract might have been made to grade the street. But the formal proceedings failing to show that the yeas and nays were called and recorded, and that a majority of the whole number of trustees voted for the resolution awarding the contract to Keegan, as required by the statute, the contract must be held null and void. It is claimed, however, that this contract was subsequently ratified, and it is upon this theory the judgment is sought to be sustained. Not being *ultra vires*, the contract was susceptible of ratification.

Does it appear, then, from the record, or can it properly be inferred, that there was a valid ratification? The bill of exceptions shows, as before stated, that about one-half the grading contracted for was done, and that defendant accepted and paid therefor. Copies of the proceedings and resolutions of the board of trustees, ordering warrants to be issued on account of the work so performed, are set out therein. This is the character of the evidence relied on to prove the ratification, and counsel insist that inasmuch as all the evidence is not before us, we must presume that there was sufficient evidence to establish the fact of ratification. If this kind of evidence was sufficient to constitute a valid ratification of the contract, the presumption might be indulged. But, as we have seen, it could only be ratified by a resolution or ordinance adopted in the same manner required by the statute for the awarding and making of the contract in the first instance. These formalities were not observed in the passage of the resolutions before us, and it follows that unless there was testimony in the case of a wholly different character from that contained in the bill of exceptions, of which we have no notice, the judgment upon the issues joined in this case was unauthorized. We may presume that the work of grading the streets was completed in accordance with the terms and specifications named in the written instrument, and that it was thought accepted by the defendant; but this, together with the evidence furnished by the record itself, falls short of a valid ratification; consequently such facts impose no liability upon the defendant to pay for the improvement on the basis of the contract stipulations. Proceedings, to be effectual for such purpose, would be the equivalent of original authority to make a valid contract. We are not advised in any manner that such proceedings were had, and under the circumstances of this case they cannot be presumed. The action being upon the written instrument, and the measure of recovery having been based upon the contract price, the judgment was not warranted.

We do not understand from the record that the expense of this improvement was to be, in any event, assessed upon the owners of adjoining property. This being so, in the absence of an ordinance on the subject, providing a particular mode of proceeding in such cases, there would seem to have been no necessity for either advertising for bids, or for letting the work upon contract. The record contains no intimation of the existence of such an ordinance. The statute author-

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izes the board of trustees to make improvements of this character ; to appropriate money for corporate purposes ; and to provide for debts and expenses of the corporation. In the absence of express regulations upon the subject, therefore, the defendant would seem to be liable, under proper issues, for the reasonable value of the services rendered.

For the reasons assigned, the judgment must be reversed, and the cause remanded.

SUPREME COURT OF NEW MEXICO.

(37 N. M. [GHA.] 477)

ARMILLO v. BOARD OF COUNTY COM'RS OF BERNALILLO Co.

January Term, 1885.

1. COUNTY COMMISSIONERS—DEFAULTING SHERIFF—JURISDICTION.

A board of county commissioners, in considering the case of a defaulting sheriff, with a view to declaring his office vacant in case the default is proved, act in a *quasi* judicial capacity. They are a board of special and inferior jurisdiction, and there is no presumption arising in their favor as to the regularity of their proceedings. Their jurisdiction, therefore, must be made to appear upon the record of said proceedings, and evidence of it cannot be sought *aliunde*.

2. SAME—CERTIFICATE—POWERS OF BOARD.

Without first receiving a certificate of the default of the sheriff, under the hand and seal of the clerk or territorial auditor, the board of county commissioners is not empowered to act in the premises.

3. SAME—CERTIORARI—WHAT THE WRIT BRINGS UP.

The common-law writ of *certiorari* to review a summary conviction under a penal statute brings up not only questions affecting the jurisdiction of the magistrate, but whether there was sufficient evidence to warrant a conviction of the party accused; and in such case the evidence must appear on the face of the record, or the conviction will be quashed.

Certiorari. Appeal from Second district court, Bernalillo county.

Neill B. Field and Childers & Fergusson, for petitioner and appellee.

Stone & Stone, for respondents and appellants.

By THE COURT. This case is affirmed for the reasons given in the opinion of the learned judge before whom the case was tried in the court below.

(Opinion of Lower Court.)

BELL, J. This is a *certiorari* granted by the district court for the county of Bernalillo, and directed to the board of county commissioners of the said county. The writ was granted upon the petition of the relator, setting forth that at a special session of the board of county commissioners of the county of Bernalillo, held on the twenty-first of February, 1884, the following proceedings were had: That the report of the clerk of the said board of county commissioners was filed, by which said report it was pretended to be shown and certified by the said clerk that he, the said Perfecto Armijo, then and there being the sheriff and *ex officio* collector of the said county, was indebted to the said county in the sum of \$5,509.94; that thereupon the said report was pretended to be approved by the said board of county commissioners as submitted, and that the said board of commissioners attempted to pass and did pass a resolution declaring the offices of the relator as such sheriff and *ex officio* collector to be vacant. The petitioner then charges that under the law the said county commissioners had no sufficient showing before them to justify the removal of the petitioner from his said offices. The petition also sets forth other matters, but it is not necessary to recite them here.

Upon this petition the writ was issued, requiring the said board of commissioners to transmit to this court, for its examination and review, all original papers, and a full and complete transcript of all the proceedings, in the matter of the removal or attempted removal of the relator from his offices of sheriff

and *ex officio* collector of the county of Bernalillo, and in the matter of declaring the said offices vacant.

To this writ the board of commissioners made a return, showing certain proceedings of the board upon August 6, 1883, by which it appears that, at a meeting of the board on that day, certain persons, who had been appointed by the board as accountants, at a prior session, to examine into and report upon the accounts of the various county officials, made their report, and that the clerk was instructed to give notice to the collector to proceed at once and collect certain outstanding licenses and certain taxes. That afterwards, and on third day of September, the board held another meeting, at which the following proceedings were had: "The report of J. W. Barton and Charles F. Pierce, the experts appointed to examine into the condition of the accounts of the various county officials, was called for and presented, and after due consideration, on motion of W. E. Talbott, it was ordered that the report and statement be received and published in the *Morning Journal*, of Albuquerque. Perfecto Armijo, sheriff and collector, appeared, as per order of the prior meeting, and submitted his accounts, with the statement that he could explain and account for the differences between the same and the statement of the accountants. After due investigation it was unanimously ordered that the clerk be instructed to spread the following orders on the records, and furnish copies of the same to the parties interested.

"Upon an investigation of the accounts of the county officers, ordered to be made by the board of county commissioners, at the regular meeting, held on the seventh day of July, A. D. 1883,—said investigation having been made under such order, and a report made in pursuance therewith on the third of September, A. D. 1883, as ordered; and also a report having been made by Perfecto Armijo, sheriff of Bernalillo county, New Mexico; also by Charles W. Lewis, treasurer of said county,—it appears by said reports that Perfecto Armijo, sheriff as aforesaid, is indebted to the said county of Bernalillo as follows, to-wit:

To the county fund,	-	-	-	-	-	-	-	\$3,589 96
To the school fund,	-	-	-	-	-	-	-	746 90
Total indebtedness of sheriff,								\$4,336 86

"And it is therefore ordered that the said Perfecto Armijo, sheriff as aforesaid, be, and he is hereby, ordered to make his accounts good, and settle said indebtedness, on or before the first Monday in October, A. D. 1883, and the clerk of said board is hereby required to notify him of said order."

The return further shows that on the twenty-first day of January, 1884, a meeting of the board was held, at which the following proceedings were had, to-wit: "On motion of J. R. Armijo, seconded by W. E. Talbott, J. W. Barton and C. F. Pierce were sworn to the correctness of the accounts of the various county officers, as examined and reported by them to this board September 3, 1883. On motion of J. R. Armijo, seconded by Ortiz, it was ordered that a statement of the collector's accounts with the county be forwarded to the governor; the vote on the same standing, J. R. Armijo and Antonio Ortiz in the affirmative, and W. E. Talbott in the negative; whereupon the collector asked that an extension of time be granted in order to allow him to compare accounts with the clerk; and upon motion of Antonio Ortiz the vote was reconsidered, and time of forwarding of statement extended to the next regular session."

The return does not show when the next regular session was to be held, but the proceedings of the session of January 21, which appears to have been a special session, are followed in the return by the proceedings of a special session held February 19, 1884, at which the following proceedings were had, to-wit:

"The collector presented his report for the consideration of the board. On account of the absence of the county attorney, a motion was made by J. R. Armiijo to place the report on file until the next meeting, which was seconded by Ortiz, and carried."

The return then continues as follows:

"Special session, February 21, 1884. Session opened in due form. Present: J. R. Armiijo, president; Antonio Ortiz and William E. Talbott, commissioners; Perfecto Armiijo, by Henry Richmond, deputy. The report of the clerk of the collector's accounts, as filed by him, and as shown by the clerk's records, was called for and submitted, showing the said collector to be indebted to Bernalillo county in the sum of \$5,509.94, after deducting all delinquent taxes, as claimed by him. The report was approved as submitted. A motion was made by J. R. Armiijo, and seconded by Ortiz, that the offices of collector and sheriff be declared vacant; J. R. Armiijo and Antonio Ortiz voting in favor of the motion, and W. E. Talbott voting against. A motion of Francisco Armiijo y Otero to extend time to the sheriff to present his explanations was carried; Talbott and Ortiz voting in favor, and J. R. Armiijo voting against. A motion of J. R. Armiijo to adjourn *sine die* was carried unanimously.

[Sgd.]

"J. R. ARMIJO.

"ANTONIO ORTIZ.

To these proceedings, or rather to the record of these proceedings, a certificate of the clerk of the board of commissioners is attached. On behalf of the relator a motion was filed to quash the proceedings set out in the return, for the following reasons. "*First.* Because it does not appear from the said return that the said board of county commissioners had jurisdiction of the subject-matter in controversy in said proceedings mentioned. *Second.* Because it does not appear from the said return that said board had jurisdiction of the person of the petitioner, against whom the said proceedings were had. *Third.* Because it does not appear from the said return that the said board had any evidence before them upon which to base the judgment attempted to be rendered by them in the said cause."

The first question raised upon the motion is as to the jurisdiction of the county commissioners to act in the premises. The only provision of law authorizing the board of county commissioners to remove the *ex officio* collector of the county is section 3 of the act of the legislative assembly of the territory of New Mexico, approved March 1, 1882, which provides as follows:

"Whenever any county collector shall fail to pay into the county or territorial treasury any moneys in his hands due the county or territory respectively, at the time prescribed by law, and such default continues for thirty days after the time so prescribed, he shall, in addition to other penalties, forfeit his office, and be deemed a public defaulter; and the county commissioners, immediately upon the receipt of a certificate of such default, under the hand and seal of the clerk or territorial auditor, shall declare said office vacant, and fill such vacancy by appointment."

There can be no doubt that the action authorized by this section of the law is summary and penal in its character, and in derogation of the common law. In such cases it is well settled that, in order to justify such action as is authorized, a strict compliance with the provisions of the statute must be made before action is warranted.

The authorities on this subject are uniform, and the principle is fairly stated in the case of *Owens v. Andrew Co.* 49 Mo. 379, where the court says: "It is a principle of universal recognition that all statutory provisions authorizing proceedings of a summary character, and contrary to the course of the common law, are to be strictly construed." The board of commissioners in this case undoubtedly acted in a *quasi* judicial capacity. They are a board of special and inferior jurisdiction, and there is no presumption arising in their

favor as to the regularity of their proceedings. Their jurisdiction must therefore be made to appear upon the record of said proceedings, and evidence of it cannot be sought *aliunde*. Upon this subject the court of appeals of New York, in an elaborately considered case, says: "Inferior magistrates, when required by writ of *certiorari* to return their proceedings, must show affirmatively that they had authority to act; and whereas, in the present case, their authority and jurisdiction depend upon a fact to be proved before themselves, and such fact be disputed, the magistrate must certify the proofs given in relation to it, for the purpose of enabling the higher court to determine whether the fact be established. The decision of the magistrate in relation to all other facts is conclusive and final, and will not be reviewed on a common-law writ of *certiorari*; but the main object of this writ being to confine the action of inferior officers within the limits of their delegated powers, the reviewing court re-examines, if required, the decision of the magistrate on all questions on which his jurisdiction depends, whether of law or of fact." *People v. Goodwin*, 5 N. Y. 568. That case arose under a statute of New York, by which the commissioners of highways were empowered, under certain circumstances, to lay out and open roads, but were prohibited from opening a road through any building without the consent of the owner. The question was whether the court could, upon a common-law writ of *certiorari*, review the evidence, under an issue in the case, as to whether the consent of the owner had in fact been obtained; and it was held that as this was a jurisdictional fact, the existence of which was absolutely essential to give any validity to the proceedings of the commissioners, the evidence in relation to it was properly returned, and entitled to be considered.

In the case at bar, the board of county commissioners were authorized to act "whenever any county collector shall fail to pay into the county or territorial treasury any moneys in his hands due the county or territory, respectively, at the time prescribed by law, and such default continue thirty days after the time so prescribed, * * * immediately upon the receipt of a certificate of such default under the hand and seal of the clerk or territorial auditor. * * *" No such certificate appears in the return of the proceedings of the board. It is entirely clear that the very foundation of their jurisdiction would necessarily be such a certificate as is prescribed by the statute quoted. Without it, they would have absolutely no jurisdiction to act. The recital in the record of their proceedings of the twenty-first February, 1884, when the action complained of was taken, shows neither such a certificate of record, nor is there any allusion whatever to the receipt of such a certificate. It is claimed by counsel for the board that the recital in those proceedings, as follows: "The report of the clerk on the collector's accounts, as filed by him and as shown by the clerk's records, was called for and submitted, showing the said collector to be indebted to Bernalillo county in the sum of \$5,509.94, after deducting all delinquent taxes as claimed by him,"—is a sufficient compliance with the provisions of section 3 of the statute. This view of the law is hardly worth consideration. It is sufficient to say that the recital does not even pretend to recite such facts as the statute requires shall appear in the certificate of the clerk to be returned to them; but even if it did, the failure to return the certificate required by the statute necessary to show the jurisdiction of the board to act, would be fatal to the proceedings.

"It is well settled that the common-law writ of *certiorari* to review a summary conviction under a penal statute, brings up not only questions affecting the jurisdiction of the magistrate, but also the question whether there was any evidence to warrant the conviction, and in such cases the evidence must appear on the face of the record, or the conviction will be quashed." *Mullins v. People*, 24 N. Y. 399; *People v. Sanders*, 3 Hun, 16.

The case of *McGregor v. Board Sup'rs Gladwin Co.* 37 Mich. 388, was one

very analogous to the case at bar. That was the case of a *certiorari* to the board of supervisors to review their proceedings, by which they declared the office of the relator, McGregor, to be vacant, because of his failure to file a new and additional bond, as he was required by them to do. The court says.

"It appears from the records which have been sent up here, in response to the writ of *certiorari*, that the plaintiff had filed his official bond, which was approved by the board, but that subsequently a new bond was required of him, and that he was given until June 26, 1877, to file it. On the day last mentioned the time for filing it was extended to July 17th. The board was in session July 17th, and on motion of one of its members a resolution was unanimously adopted, declaring the office of county treasurer vacant. The record does not show that plaintiff in error was present at this meeting, or that he was notified thereof, or notified that any action against him was proposed. A writ of *certiorari* having been sued out and certified, the board returned that the new bond was demanded because it was found that the sureties in the first were not responsible. They also return that the plaintiff in error was notified of the demand, and appeared before the board and stated that he would give the bond required, if he could procure sureties, but that he failed so to do, and stated that he was unable; whereupon the board proceeded to remove him. The sufficiency of this return as an answer to the writ is the question before us. My brethren think that before the board could proceed to a removal, it should have appeared from their own records that all the facts existed which would authorize the board to take action. This would involve some finding or resolution that the existing bond was insufficient, the requirement of a new bond, notification of the defendant of the fact, a failure on his part to comply, and proceedings subsequently for his removal, of which he should have notice, and an opportunity to make defense. They also think that the deficiencies in the record in this regard cannot be supplied by the return to the writ of *certiorari*. Removal from a public office is a matter of serious consequence, and it is plain that all the facts which would justify it ought properly to be of record, and my brethren think it essential."

I quote thus fully from the Michigan case, not only because of its strong analogy upon the facts otherwise to this case, but also because in this case it is claimed that the certificate of the county clerk, attached to the return of the proceedings, set forth in effect that the board of county commissioners, at their meeting on February 21, 1884, were in receipt "of a certificate under the hand and seal of the clerk, as provided by section 3 of the act of 1882," and that this amounted in effect to the certificate required by law to be before them. This certificate of the clerk, as in the Michigan case, is no part of the record, and cannot be considered as part of the proceedings which are to be reviewed in this court. It in no way cures the defect in the record itself of the proceedings nor does the record in this case show either that the defendant was present at the meeting when the action complained of was taken against him, or that he had any notice of such meeting, or intention on the part of the board of commissioners. I am of opinion that he was entitled to such notice, and entitled to be heard, before the board would be authorized to act; otherwise, I am of opinion that the statute under which authority to act is claimed, would be null and void, as no person should be deprived of such rights as he had in his office without being given his "day in court."

It follows from these views that the motion to quash the proceedings of the board of county commissioners must be granted; and it is so ordered.

SUPREME COURT OF OREGON.

(12 Or. 247)

WALTZ and others v. FOSTER and others.

Filed May 4, 1885.

INJUNCTION—OBSTRUCTION OF HIGHWAY—RIGHTS OF PLAINTIFF IN LOCUS IN QUO.

An application for injunction to restrain defendant from obstructing a street or highway, will not be considered when it appears that plaintiff's rights to the use of the *locus in quo* in the land are in doubt

Appeal from Baker county.

Y. C. Hyde, for respondents.

H. Williams and Wm. M. Ramsey, for appellants.

LORD, J. This is a suit for an injunction to enjoin the defendants from obstructing an alleged street or highway. The plaintiffs base their right to the relief sought upon the ground that they are the owners and occupants of certain lands abutting such alleged street or highway; that they have a special interest in the uninterrupted and undisputed use of the same as indicated in their complaint; that said street or highway had been dedicated by their grantors to the public, and constituted a part of the consideration for their purchase of said lands; and that the defendants avow their purpose, and will, if not restrained, permanently obstruct the same by the erection of a fence and building thereon. The answer denies nearly all the allegations of the complaint, and sets up new matter, most of which is controverted by the reply.

There is but one question presented by this case, and that is, is the *locus in quo* a public street or highway? Has it been dedicated as such to the public? When this point is established or adjudicated, it is not disputed that if the plaintiffs, as adjacent owners, suffer an injury distinct from the public, as a consequence of such obstruction, equity will afford relief and abate such nuisance. We are therefore confronted with the inquiry, at the threshold of the case, whether equity will intervene when the right to the use of the *locus in quo* is in dispute, and must first be investigated and judicially determined before the plaintiffs can be properly regarded as such adjacent owners, and entitled to the relief sought by reason of special injuries sustained or justly apprehended as a result of such obstruction. When the right to the use of the street is admitted, or easy of ascertainment, an injunction will be granted to restrain its obstruction by building a house thereon, in favor of adjacent owners, when such obstruction works a special injury to them. *Corning v. Lowerre*, 6 Johns. Ch. 439, *Luhrs v. Sturtevant*, 10 Or. 171; *Shed v. Hawthorne*, 3 Neb. 179. But where the right to the use of the street or highway has not been established at law, or is not clear nor easy of ascertainment, but is questioned and contested on every ground on which the plaintiff puts it, not only by the answer of the defendants, but by the proofs in the

suit, the remedy by injunction will not be granted. High, Inj. §§ 816, 820; 2 Story, Eq. Jur. 924, and note.

A brief reference to a few adjudicated cases and the authorities cited will illustrate this principle:

In *Rhea v. Forsyth*, 37 Pa. St. 506, WOODWARD, J., in delivering the opinion of the court, said:

"From these and many more authorities, which might be cited to the same effect, it is apparent that where the plaintiff's right has not been established at law, or is not clear, but is questioned on every ground on which he puts it, not only by the answer of the defendants but by the proofs in the cause, he is not entitled to remedy by injunction. It is not enough that he is able to produce some evidence of his right, when there is conflicting evidence that goes to the denial of all right. In such case the plaintiff should first establish his right in an action at law, and then come into chancery, if necessary, for the protection of the legally established right."

And again:

"In the case before us the plaintiff rested his case on two grounds: *First*, the use and occupation of the alley by several occupants of adjacent buildings for more than twenty-one years; and, *second*, the joint dedication of several lot-owners of this alley in 1849 to their common use. But both grounds were denied by the defendant in his answer, and there was conflicting evidence in regard to both. It is not worth our while to go through and discuss the testimony, for the question of fact ought not to have been brought here for us to decide. Neither the equitable jurisdiction of the court below, nor our jurisdiction, can properly attach until the plaintiff has established his right at law. Has the alley been in common use so long that the successors in the title may set up a presumption of a grant? If not, did the defendant dedicate it to the use of the plaintiff's lot? These are questions for a court and jury to decide in an action at law."

See, also, *Bunnell's Appeal*, 69 Pa. St. 59; *Com. v. Rush*, 14 Pa. St. 192.

In *Green v. Oakes*, 17 Ill. 250, an injunction was granted for obstructing a public road, in which the answer denied that the road is a public highway, or has been used as such for 20 years. But the evidence showed that the road had been used as a public highway of the county, with the knowledge and consent of the owners of the land over which it runs, for more than 21 years, and had been worked and treated by the authorities having jurisdiction of roads as one of the public roads of the county. In fact, there was not only no conflict of evidence, but no evidence whatever against the existence and use of the road as alleged, which, for the purposes of the case, was practically admitted, and the remedy by injunction was sought to be avoided upon other grounds. In the course of his opinion SKINNER, J., said:

"If equity will grant relief by injunction in favor of an individual interested against one about to shut up the road, and it is one of the public highways of the county, then the circuit court should have made the injunction perpetual, instead of dismissing the bill. Although courts of equity will not interpose by injunction to prevent an obstruction of an alleged easement or way, or the creation of a nuisance or purpresture, when the right was doubtful, and there is a remedy at law, yet where the right is clear and appertains

to the public, and an individual is directly and injuriously affected by the obstruction of the easement, or the creation of the nuisance, they will interfere on the application of such individual to prevent the threatened wrong or invasion of the common right."

And again:

"Where the facts are easy of ascertainment, and the rights resulting therefrom free from difficulty, equity will grant relief, either at the suit of the public, or of the citizen having an immediate interest therein."

To the same effect is the case of *Keystone Bridge Co. v. Summers*, 13 W. Va. 485, in which the court say:

"But if the right of the public to the use of the highway is clear, and a special injury is threatened by an obstruction of the highway, and this special injury is serious, reaching the very substance and value of the plaintiff's estate, and is permanent in its character, a court of equity, by an injunction, ought to prevent such nuisance."

See, also, *Dunning v. Aurora*, 40 Ill. 481; *Higbee v. Camden & A. R. & T. Co.* 20 N. J. Eq. 435; *Luhrs v. Sturtevant*, 10 Or. 174; Pom. Eq. Jur. §§ 1346, 1347, and notes.

The general rule, therefore, would seem to be that where the existence of the right to the use of the highway as such is admitted, or the right is clear or easy of ascertainment, and free from all reasonable doubt, and the obstruction of it seriously affects the value and substance of an individual's estate, equity will afford relief by injunction. But, conversely, it will be refused. The jurisdiction of the court is exercised rather to protect acknowledged rights than to establish new and doubtful ones. "The court," said ELLSWORTH, J., "doubtless possesses the necessary power, but it is not to be exercised as a matter of course, even when the plaintiff suffers some injury to his real estate. Whenever the right is doubtful, or needs the investigation of a jury, a court of equity is always reluctant to interpose its summary authority, for it is rather the duty of the court to protect *acknowledged rights* than to establish new and doubtful ones." *Roath v. Driscoll*, 20 Conn. 538; *Burnham v. Kempton*, 44 N. H. 92.

Now, what is this case? The facts disclosed by the record, which are uncontroverted, show that the lands purchased by the plaintiffs were sold by metes and bounds, and without reference to any plat made by the plaintiffs' grantor, upon which such alleged street was located. No lots or blocks were made by monuments on the ground, and no plat thereof was ever made or rendered; nor have the public authorities, to whom is intrusted the jurisdiction of public roads, ever worked or treated the alleged road or highway as a public street, but, it is alleged in the complaint, have neglected and refused to act upon the petition of the plaintiffs in the premises. Upon the question of dedication, we shall refrain from the expression of any opinion, except to say that the evidence is conflicting and hopelessly irreconcilable. Upon the one hand, the plaintiffs' evidence tends to show by acts and declarations that the *locus in quo* was dedicated as a public street, or at least as an easement to their common use as adjoining

land-owners. The case in this regard is somewhat analogous to the facts in *Rhea v. Forsyth, supra*. And, upon the other hand, the defendants claim to be the legal owners of the land in dispute, and, with much evidence, endeavor to contradict and contest every ground upon which the plaintiffs put their right to the use as alleged. As applicable to this case, we adopt the language of the court in *Hacker v. Barton*, 84 Ill. 314, as peculiarly appropriate:

"The evidence in this record is as conflicting and antagonistic as are the opposing interests of the parties litigant. Without intending to say anything that might in the slightest degree affect the right of either party in any action at law, we may say both propositions asserted and denied in the respective pleadings, viz, ownership of the land and the fact of dedication to public uses, are so much involved in doubt, they ought to be made subjects of investigation in appropriate actions at law. Especially in regard to the alleged fact of the dedication of the land to public uses, there is irreconcilable conflict in the testimony. That of one party must be rejected, and that is always a matter of great delicacy with the court trying cases as a chancellor. When the questions indicated upon which the whole controversy depends have been settled in a court of law, either party might appropriately invoke the aid of a court of chancery to prevent vexatious litigation in regard to the same subject-matter."

Where the emergency is pressing, and a *prima facie* case is presented, a temporary injunction may doubtless be granted until the legal right of the parties may be determined. But the object here is to make the injunction perpetual in the suit, the manifest object of which is to adjudicate title to the *locus in quo*. In cases of this character, when the parties are not clear, but involved in doubt and uncertainty, it presents a subject peculiarly appropriate for the investigation of a court and jury. The bill must therefore be dismissed, without prejudice to whatever rights the plaintiffs may desire to assert at law.

(12 Or. 253)

McINTYRE v. KAMM and others.

Filed May 4, 1885.

1. PROVING AN UNACKNOWLEDGED DEED—AFFIDAVIT—SWEARING OF WITNESS.

In proving an unacknowledged deed by a person who witnessed its execution, the affidavit of said witness is not valid unless it states that he was duly sworn.

2. STATUTE LAW—LAW ADOPTED FROM ANOTHER STATE—RULE OF CONSTRUCTION.

The incorporation into the authorized and published statutes of the territory of Oregon, of a New York law, with references in the margin sustaining such law by decisions of New York courts, gives to such decisions and the New York practice thereunder the weight of authority in its construction.

Appeal from Multnomah county.

Action to recover certain real property in Multnomah county. At the trial the appellant gave in evidence (1) a patent from the United States to Alexander Brown and wife under the donation law of September 27, 1850, including the premises in controversy; (2) a decree of the county court of Multnomah county, made at the April term thereof, 1859, by which the east half of said claim was partitioned

among the children of said Alexander Brown, then deceased. In order to make the partition, said east half of the claim was divided into parcels, numbered respectively from one to six, inclusive, and designated as lots, two of which, lots 5 and 6, are the parcels in controversy. Lot 6 was set apart to Sarah McIntyre, the appellant, a daughter of the deceased, and lot 5 was set apart to another daughter, Nancy J. Brown, now Nancy J. Dray; and (3) a warranty deed to said lot 5 from Nancy J. Dray and her husband, dated December 18, 1883. The respondent then offered in evidence a writing, under seal, which they claimed to be a deed to said lot 5 from said Nancy J. Brown to William Stephens. The instrument was not acknowledged, but an attempt had been made to prove its execution, which was indorsed thereon as follows:

"State of Oregon, County of Multnomah. I, F. R. Strong, a notary public in and for said county and state, do hereby certify that on this twenty-first day of September, 1883, personally appeared before me, P. A. Marquam, one of the subscribing witnesses to the above and foregoing deed, and acknowledged to me that he resides "in the county of Multnomah and state of Oregon, and has resided in said county and state for a long time prior to the date of said deed and that he personally knew Miss Nancy J. Brown, the person described in and who executed said conveyance, and that the above and foregoing deed was signed and executed by Miss Nancy J. Brown, the grantor named therein, on the twenty-sixth day of October, 1864, the day it bears date, and that the said P. A. Marquam and one G. B. Gray, at the request of said Nancy J. Brown, and in her presence, signed our respective names as witnesses thereto; and thereafter said deed was delivered by said Nancy J. Brown to said William Stephens, the grantee named therein. And I further certify that I am personally acquainted with said P. A. Marquam, the said subscribing witness, and have been so personally acquainted with him for over fifteen years.

"In witness whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[Notarial Seal.]

"F. R. STRONG,

"Notary Public for Oregon."

During the trial a certificate was obtained from T. A. Wood, a notary public, and indorsed upon the deed, which was intended to obviate the objections to the foregoing. The deed thus certified was admitted against the appellants' objections. The respondent then offered in evidence what was claimed to be a deed from the appellant to William Stephens to said lot 6. The descriptive part of the deed is as follows:

"All the right, title, and interest of the said Sarah Brown in and to the donation land claim of Alexander Brown, deceased, late of Multnomah county, in the state of Oregon, and more particularly designated and known as lot No. 5 of said donation land claim, as surveyed, designated, and set apart to the said Sarah Brown, heir-at-law of said Alexander Brown, deceased, by the probate court of said Multnomah county, in the state of Oregon; reference thereto being had, as will more fully appear in the records of said court."

This deed was also admitted in evidence against the appellants' objection. Upon these facts the court directed a verdict for the respondent, and from the judgment entered thereon this appeal is taken.

A. H. Tanner and R. E. Bybee, for appellants.

Joseph Simon, for respondent.

WALDO, C. J. The practice of proving a deed for the purpose of having it recorded grew up in New York in colonial times as a part of the common law of the state. *Van Cortlandt v. Tozer*, 17 Wend. 338; S. C. 20 Wend. 423. We have no such common-law practice in this state. We doubtless take judicial notice at common law of what is termed "an acknowledgement of a deed." *Morris v. Wadsworth*, 17 Wend. 113; *Pidge v. Tyler*, 4 Mass. 541. But, apart from the express enactment of our statute, we do not know what is intended by the expression "proving a deed" for purposes of registration. Nevertheless, the legislature, in enacting the statute, seemed to have supposed that they were legislating upon a subject well understood in the law, and hence, doubtless, arose what is obviously an imperfect explanation of the mode in which proof shall be made, and the manner in which it shall be certified. The term is first seen in the Laws of Oregon Territory of 1854, page 478, and, as may be drawn from the preface and the marginal references to the text, was a transcript from the laws of New York. That fact, under the circumstances attending the publication of the laws of that year, gives to the decisions and practice of the courts of New York prior to the enactment of our statute the weight of authority in its construction. According to the practice in that state, which may be taken as a declaration of the law, it seems to have been necessary, not only that the witness should be sworn, which might seem otherwise obvious, but that that fact should be stated in the certificate. *Jackson v. Livingston*, 6 Johns. 149; *Jackson v. Osborn*, 2 Wend. 555; *Bradstreet v. Clarke*, 12 Wend. 673; *Norman v. Wells*, 17 Wend. 137; *Van Cortlandt v. Tozer*, Id. 338; *Carver v. Astor*, 4 Pet. 82.

The case of *Hunt v. Johnson*, 19 N. Y. 292, (not cited by counsel,) seems, indeed, to support the defendant's position, that the certificate need contain only what the statute expressly specifies it should contain. But the decision seems to overlook the fact that there was a law governing the subject in New York prior to the statute, which should be considered in the construction of the statute; and also seems to have overlooked what seems to have been a uniform practice the other way. Nor can the decision be upheld on principle which requires the facts to be stated in the certificate, that the court may see that the deed was duly proved. MARSHALL C. J., *Ross v. McLung*, 6 Pet. 287. The power of the officer in taking the proof may be likened to that of an inferior court, "which ought not to show things only by implication, but ought to show them expressly." *Barnaby v. Goodale*, Style, 2.

It is sufficient at present, without examining the certificate in other particulars, that the certificate must be held bad because it does not show that the witness was sworn, and on this ground it was rightly excluded by the court below. The result was that the record title was

in the plaintiff. It followed, then, that if the certificate of the notary, Woods, made at the trial, was otherwise valid, no other effect could be given to it than if the witness himself had been produced, and proved the deed at the trial. On this point we agree with Mr. Justice CAMPBELL in *Shotwell v. Harrison*, 22 Mich. 423, that the recorded deed is *prima facie* evidence of everything necessary to give it validity. This being a controversy between legal titles, the defendants could have assailed the plaintiff's title on the ground of notice or want of consideration at law. *Jackson v. Burgott*, 10 Johns. 457. But the burden was on the defendants to set up the facts invalidating the plaintiff's title, and to prove them at the trial. *Monroe v. Thomas*, 1 Or. 201; *Ryder v. Rush*, 102 Ill. 340. As this was not done, it was error to admit the deed on the Woods certificate alone, and direct a verdict for the defendants as to said lot.

The description in the deed from Sarah Brown to William Stevens was sufficient to convey lot 6. The case comes within the rule laid down in *Stukeley v. Butler*, Hob. 172, where, showing that a contradictory explanatory clause will not avoid what was sufficiently granted before, it is said:

"As, if I have in D. blackacre, whiteacre, and greenacre, and I grant unto you all my lands in D.,—that is to say, blackacre and whiteacre,—yet greenacre will pass too."

And see *Bell v. Potts*, 5 East, 49; *Jackson v. Loomis*, 18 Johns. 81; *Worthington v. Hylyer*, 4 Mass. 196; *Raymond v. Coffey*, 5 Or. 132.

It follows that the judgment of the court below must be affirmed as to lot 6, and reversed as to lot 5, and a new trial ordered, with leave to the defendants to apply to the court below for leave to amend their answer.

(12 Or. 267)

HOVENDEN v. KNOTT and others.

Filed May 11, 1885.

FORECLOSURE OF MORTGAGE—CONTROVERSY BETWEEN DEFENDANTS.

In proceedings in a case of foreclosure of mortgage, any matters brought into controversy by the defendants *inter se*, are not properly before the court, and should not be considered in the decree.

Appeal from Multnomah county.

H. T. Bingham, for appellants.

J. C. Moreland, for respondent Hovenden.

Alfred F. Sears, for respondents Estes.

THAYER, J. This appeal is from a decree of the circuit court for the county of Multnomah, rendered in a suit brought by the respondent Hovenden against Levi and Mary E. Knott, and Jennie E. and Levi Estes, to foreclose a mortgage upon certain real property situated in the city of Portland. The mortgage was executed by Jennie E. and Levi Estes to the said Hovenden, as collateral to a promissory note,

also executed by the former to the latter party, and indorsed by the said Levi Knott. The property mortgaged was owned by Jennie E. Estes, who is the wife of said Levi Estes. Levi Knott was alleged to have had some interest in the mortgaged property, and the said Mary E. Knott, who is the wife of the said Levi Knott, seems to have been made a party to the suit in consequence of that fact alone. After the summons had been served upon all of the defendants in the suit, the defendants Levi and Jennie E. Estes filed the following paper, which they termed an answer:

"Now come the defendants Levi Estes and Jennie Estes, and for their separate answer herein, and for cause of relief against the defendant Levi Knott, allege: That the note and mortgage described in the complaint were executed and delivered by the defendants Levi Estes and Jennie Estes for the accommodation of the defendant Levi Knott, and these defendants never received any consideration therefor, and the same were made and given to the plaintiff at the request of said defendant Levi Knott, as aforesaid, and upon his promise that he would pay the same at maturity, of all which facts the plaintiff had full knowledge; that the said Levi Knott is possessed of sufficient funds to pay said note, and has abundant property, not exempt from execution and unincumbered, available therefor. Whereupon, these defendants pray that a decree may be entered in accordance with said facts: *First*. That said Knott be decreed to be the principal debtor primarily liable for said debt and demand of plaintiff, and that said demand be satisfied, first, out of the property, personal and real, of the said Levi Knott. *Second*. That these defendants and the real property owned by said mortgagee be declared generally liable, and that the plaintiffs be entitled to judgment against them, and to the subjection of their property to foreclosure after the exhaustion of the remedy aforesaid against said defendant Levi Knott, in case any deficiency exists. For such other and further relief as to equity and good conscience appertains."

Whereupon the defendant Levi Knott filed the following paper, which he termed a reply:

"Now comes defendant Levi Knott, and, replying to the answer of Levi Estes and Jennie Estes, herein filed, denies that the note and mortgage described in said complaint were executed or delivered by the defendants Levi Estes and Jennie Estes, or either of them, for the accommodation of this defendant; denies that said Levi Estes and Jennie Estes never received any consideration for said execution thereof; denies that said note and mortgage were made or given to the plaintiff at the request of this defendant as in said answer aforesaid, or at all made or given at the request of this defendant; denies that said note and mortgage, or note or mortgage, were made or given upon this defendant's promise that he would pay the same or any part thereof at maturity or at all; denies that of said facts, or any of them, said plaintiff had full or any knowledge. Said defendant, further replying to said answer, alleges that said note was indorsed by this defendant without consideration for the accommodation of said defendant Levi Estes, at his request, and upon his express promises and agreement that he would at maturity pay the same and hold this defendant harmless therefor. Wherefore, this defendant prays for a decree that said defendants Levi Estes and Jennie Estes be decreed to be the principal debtors, and primarily liable for said debt and demand of plaintiff, and that, as between said defendants and this defendant, said demand be satisfied first out of the property of said Levi Estes and Jennie Estes, and the mortgage sought to be foreclosed in the suit be decreed to be primarily liable for the payment of said debt."

Neither of the defendants attempted in any manner to defend against the suit of the plaintiff, or pretended to have any defense whatever to it. There are cases in which it is necessary to settle conflicting claims between co-defendants before a complete decree can be made upon the subject-matter of the suit. In the foreclosure of a mortgage, where there are subsequent incumbrances, it is often required to adjust their priority of equities in order to determine how the surplus fund shall be applied, as in *Ladd v. Mason*, 10 Or. 308; but this altercation between Estes and wife and Levi Knott was clearly extrajudicial. The circuit court had no more authority to undertake in the proceeding before it to determine their differences as to which was the principal debtor, and which the surety, if they sustained any such relation, than it had to adjudicate upon any other dispute between them. It was wholly foreign to the object of the suit, and unnecessary to its determination. If the facts alleged by Estes and wife in their pseudo-answer to this complaint are true, they could have pursued either of two remedies: they could have paid off the judgment recovered by Hovenden, and have recovered the amount from Knott by action or suit, or, after the obligation became payable, they could have maintained a suit against Knott to compel him to pay it. The latter remedy is in the nature of a bill *quia timet*, and is maintainable either before or after the creditor commences suit to enforce payment of the debt. It is sustained upon the grounds of the implied agreement upon the part of the principal debtor with his surety to pay the debt at its maturity, and when he fails to do so the latter may institute his suit, without having paid the debt, to compel the former to discharge it. Pom. Eq. Jur. § 1417, and note 2; Story, Eq. Jur. § 849.

Estes and wife have entirely mistaken their remedy in this case, and the court went beyond the confines of its power. It had no authority in the case before it except to decree a recovery of the amount of the debt against Levi and Jennie E. Estes and Levi Knott, a foreclosure of the mortgage, the sale of the mortgaged property, and the application of the proceeds to the payment of the said debt. And every act it did in the premises, in attempting to adjust the rights of the defendants as between themselves, was *coram non judice*. A decree should be returned in favor of the said plaintiff, and against the said defendants Estes and wife, and Levi Knott, in accordance with the principles of this decision, and the decree appealed from modified so as to conform thereto. The two parties, Estes and wife and Levi Knott, should each pay one-half the disbursements incurred in the litigation between themselves, and on this appeal, which amount should include any disbursements the plaintiff may have incurred in regard thereto.

SUPREME COURT OF CALIFORNIA.

(87 Cal. 48)

BRANDON v. LEDDY. (No. 7,760.)

Filed May 12, 1885.

DEED—PATENT AMBIGUITY—PAROL EVIDENCE TO EXPLAIN.

Where a deed, for description of the property, refers to a map, the map is to be considered with the deed in construing it, and if, from the face of such deed and map it appears that there are two lots to which the description in the deed equally applies, the ambiguity is patent, and resort cannot be had to parol, to show which lot was intended to be conveyed.

In bank. Appeal from the superior court of Santa Clara county.
John Reynolds and *S. O. Houghton*, for appellant.

J. A. Yoell, for respondent.

Ross, J. On this appeal, which is from the judgment, the judgment roll alone is brought up. The action is ejectment, and both parties claim under one Carney, who, in 1848, was the owner in fee of the premises in controversy. The defendants also claim under a tax deed, and rely further on the statute of limitations. In 1851, Carney executed to one Rosaria Bernal, under whom the plaintiff claims, a deed purporting to convey to her "one certain lot or parcel of land lying and being in the county of Santa Clara and state of California, and in the city of San Jose, and described as follows: It being twenty *varas* of lot seven and thirty *varas* of lot six, it being a part of block four, range eight, as shown by plot of said city of San Jose, being fifty *varas* square." This deed was put on record in Santa Clara county. Prior to 1848 the then Pueblo de San Jose, which is the present city of San Jose, was laid off into blocks and ranges, and each block was surrounded by streets, and was subdivided into lots, each lot being 50 *varas* square, and each block containing at least eight lots. The blocks were numbered from one to four, commencing at San Fernando street and numbering southwardly,—said San Fernando street being recognized and designated as the base line running easterly and westerly,—each tier of blocks extending on both sides of the base line constituting a range, and the ranges being numbered from one to ten, commencing at the westerly side of the pueblo. Carney, at the time of his deed to Rosaria Bernal, was the owner of lots 6 and 7 in block 4, range 8, north of the base line, but he never was the owner of lots 6 or 7 in block 4, range 8, south of the base line.

The first question to be determined is whether or not the deed from Carney to Rosaria Bernal conveyed the 30 *varas* of lot 6, block 4, range 8, north of the base line; for, if it did not do so, the defendants have the legal title to the premises by reason of a deed executed by Carney to Martha Glasson on the twenty-ninth of March, 1854, and mesne conveyances from Glasson. The map referred to in the deed

from Carney to Rosaria Bernal must be considered as incorporated in it. The deed therefore shows upon its face that there are two lots to which the description equally applies. From the deed itself it cannot be ascertained which lot was intended to be conveyed, and as the ambiguity is patent, resort cannot be had to parol. Our conclusion is that the deed in question is void for uncertainty of description, from which it results that the legal title to the lot in dispute passed to Glasson in 1854, and subsequently, but before the commencement of this action, vested by mesne conveyances in the defendants.

Judgment affirmed.

We concur: MORRISON, C. J.; MCKINSTRY, J.; THORNTON, J.

SHARPSTEIN, J. I concur in the judgment.

(87 Cal. 41)

LEARNED v. CASTLE. (No. 7,762.)

Filed May 19, 1885.

1. EQUITY—SPECIAL ISSUES TO JURY—GENERAL VERDICT.

In an action in equity a general verdict is not determinative of issues made by the pleadings, and must be disregarded.

2. NUISANCE—JURISDICTION OF DISTRICT AND COUNTY COURTS.

An action to prevent or abate a nuisance is an action in equity, and is within the jurisdiction of the district courts in California, which had conferred on them jurisdiction of "all cases in equity," notwithstanding the county courts at the same time had jurisdiction of "actions to prevent or abate a nuisance." These courts have concurrent jurisdiction of such matters.

3. JURISDICTION—SUPERIOR AND DISTRICT COURTS.

Under the provisions of the California constitution, 1879, the superior courts succeeded to, and took jurisdiction of, actions pending in the district courts, and, as no change was made as to the character of actions regarding nuisances, the superior courts properly take jurisdiction of those actions.

In bank. Appeal from the superior court of San Joaquin county. The opinion in department 1 appears in 4 PAC. REP. 191.

F. T. Baldwin, J. C. Campbell, J. H. Budd, and J. B. Hall, for appellants.

Terry & McKinne and W. L. Dudley, for respondents.

Ross, J. This action was commenced in one of the late district courts, while the late constitution was in force, to procure the abatement of alleged nuisances, and the recovery of damages alleged to have been occasioned the plaintiff thereby. A demurrer interposed to the complaint was overruled by the district court, and subsequently the case was tried in the superior court.

If the action is one in equity, the general verdict rendered by the jury in the court below is not determinative of the issues made by the pleadings, and the judgment must be reversed for a failure of the court to find upon such issues. *Warring v. Freear*, 64 Cal. 54. It was only because the action was a case in equity that the district court had jurisdiction of it. The constitution then in force gave the

district courts existing under it original jurisdiction "in all cases in equity," and to the county courts existing under it, it gave original jurisdiction "of actions to prevent or abate a nuisance." It was held here in a number of cases that the district and county courts had concurrent jurisdiction of such actions; the county courts by reason of the jurisdiction in terms conferred upon them by the constitution, and the district courts because of the jurisdiction conferred upon them "in all cases in equity." *Courtwright v. Bear River Min. Co.* 30 Cal. 576; *Yolo Co. v. Sacramento*, 36 Cal. 193.

The case at bar being one in equity when commenced, and pending in the district court, it would seem sufficiently clear that its character was not changed by the fact that the constitution of 1879 abolished the district courts and created superior courts. Under the provisions of that instrument the newly-created superior courts succeeded to the business depending in the district courts; and actions then depending, except as in the constitution otherwise provided, continued and remained unaffected by the adoption of the constitution. Article 22. There being nothing in the constitution of 1879 manifesting an intent to change the character of actions, pending at the time of its adoption in the district courts, for the prevention or abatement of nuisances, from cases in equity to actions at law, it follows that such actions retained their former characteristics notwithstanding the change of constitutions. This view renders it unnecessary to consider whether actions commenced in the superior courts for the prevention or abatement of nuisances, under the provision which gives to such courts original jurisdiction "in all cases in equity" and * * * "of actions to prevent or abate a nuisance," are cases in equity or actions at law.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKINSTRY, J.; MYRICK, J.; MCKEE, J.; THORNTON, J.

(2 Cal. Unrep. 474)

PEOPLE v. POWELLSON. (No. 20,053.)

Filed May 21, 1885.

ENTICEMENT OF FEMALE FOR PURPOSE OF PROSTITUTION.

Conviction held not sustained by the evidence.

In bank. Appeal from the superior court of the city and county of San Francisco. Defendant was convicted in the lower court of enticement of female for purpose of prostitution.

C. B. Darwin, for appellant.

E. C. Marshall, Atty. Gen., for respondent.

By THE COURT. The defendant was charged by indictment with taking, from certain individuals having the legal charge of her person, a female under the age of 18 years, for the purpose of prostitution,

under section 267, Penal Code. There was no evidence that the infant was taken from the charge or custody of the persons named in the indictment.

Judgment and order reversed, and cause remanded for a new trial.

(67 Cal. 53)

SAVINGS & LOAN SOC. v. THORNE and others. (No. 8,742.)

Filed May 22, 1885.

FINDINGS, JUDGMENT WITHOUT—VALIDITY OF WAIVER.

In an action tried by the court, where no findings are filed or waived, the judgment will be set aside on motion. Giving notice of motion for a new trial does not amount to a waiver of findings.

Department 2. Appeal from the superior court of the city and county of San Francisco.

Bennett & Wigginton, for appellants.

A. N. Drown, for respondent.

BY THE COURT. In this case a jury was waived, and trial had by the court. Findings were not filed or waived, and a judgment was entered in favor of the defendants. After the lapse of more than six months, plaintiff moved to have the judgment vacated on the ground above indicated. The motion was granted, and from the order granting it this appeal was taken.

In *Dowd v. Clarke*, 51 Cal. 262, this court said:

"There are no 'findings of fact' in this transcript, nor does it appear that such findings were waived in the court below, *in any of the three modes* provided for in section six hundred and thirty-four of the Code of Civil Procedure. Unless waived, a judgment cannot be permitted to stand, in the absence of findings of fact."

Before giving notice of his motion to have the judgment vacated, the plaintiff gave notice that he would move for a new trial, and afterwards gave notice of his abandonment of that motion. Appellants insist that by giving notice of motion for a new trial plaintiff waived findings. The statute, however, enumerates the modes by which findings may be waived, and that is not one of them. The modes enumerated must be held to be exclusive. This case is not within the purview of section 478, Code Civil Proc.

Order affirmed.

(97 Cal. 54)

PEOPLE v. TIERNEY. (No. 20,043.)

Filed May 22, 1885.

RAPE—PARTICULARS OF COMPLAINT TO ANOTHER—EVIDENCE OF.

Evidence is inadmissible, in a prosecution for rape, of the particulars of a complaint made by prosecutrix shortly after the alleged commission of the offense. MYRICK, J., dissents.

In bank. Appeal from the superior court of Nevada county.

Cross & Simonds, for appellant.

E. C. Marshall, Atty. Gen., for respondent.

BY THE COURT. On the trial of the defendant, who was charged with the crime of rape, the prosecutrix was permitted, against the objection and exception of the defendant, to give in evidence the particulars of the complaint which she testified she made to Mrs. Kieley shortly after the occurrence. This was held erroneous by this court in the recent case of *People v. Mayes*, 6 PAC. REP. 691. On the authority of that case the judgment and order are reversed, and the cause remanded for a new trial.

I dissent: MYRICK, J.

(2 Cal. Unrep. 479)

SMITH v. SAN FRANCISCO. (No. 11,023.)

Filed May 23, 1885.

APPEAL—DISMISSAL FOR FAILURE TO FILE TRANSCRIPT IN TIME.

Statement having been settled more than 40 days before the transcript of record was served and filed, time to file the same not having been extended, and no transcript having been served or filed until notice to dismiss the appeal had been served and filed, appeal ordered dismissed. THORNTON, J., dissenting.

In bank. Appeal from superior court of the city and county of San Francisco.

John Lord Love, for appellant.

McAllister & Bergin, for respondent.

BY THE COURT. It appearing that the appeal herein was perfected and the statement settled more than 40 days before the transcript of the record was served and filed, and the time to serve and file said transcript not having been extended by stipulation or by order of the court, and no transcript having been served or filed until after the notice to dismiss the appeal herein had been served and filed, it is ordered that said appeal be, and the same is, hereby dismissed.

THORNTON, J., dissenting.

(67 Cal. 36)

SILVERBERG v. PHOENIX INS. Co. (No. 8,652.)

Filed May 19, 1885.

1. FIRE INSURANCE—CONDITIONS OF POLICY—WAIVER OF.

Breach of conditions in insurance policy are held to be waived by an insurance company where, after the loss, the company directed proofs to be made out; examined witnesses at length, and vouchers showing the value of the insured property; expressed itself satisfied with the proofs; instructed plaintiff to prepare final proofs of loss; and said that the money would be paid at the end of the 60 days allowed by the policy for payment of the loss; making no objection until the expiration of that period, when defendant refused to pay the money on demand, claiming the policy to be avoided by breach of its conditions.

2. SAME—AUTHORITY OF AGENT TO WAIVE CONDITIONS.

The agents of an insurance company have authority, in the absence of a provision in the policy to the contrary, to modify or altogether waive a condition of the policy.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Clement, Osment & Clement, for appellant.

Robinson, Olney & Byrne and *Harmon J. Tilden*, for respondent.

Ross, J. It is unnecessary to decide many of the questions argued by counsel; for we are of opinion that the forfeitures relied on by appellant were waived. The policy in question was issued to insure the quartz mill and machinery of the Pinal Mill and Mining Company, situated in the territory of Arizona; and the loss was made payable to one Loomis. The fire occurred on the second of April, 1880. Soon afterwards the defendant was notified of the fact. On the seventeenth of the same month, Loomis gave an order on defendant to pay the loss to the plaintiff, which order was duly presented, and subsequently assigned the claim to plaintiff. Defendant directed the proofs to be made out, which was done, and subsequently required the plaintiff to present witnesses and vouchers. The witnesses, including the president and secretary of the company, were examined at length by defendant, as well as the vouchers, which consisted of the original receipted bills for materials, machinery, and labor in the construction of the mill. After all this the defendant said the proofs were satisfactory, instructed the plaintiff to make out formal proofs of loss, and said that the money would be paid at the expiration of the 60 days allowed by the policy for the payment of the loss. Nothing more was said by defendant until the expiration of that period, when, in response to a demand by the plaintiff for the money, defendant said the policy had been avoided by breach of its conditions, and refused to pay. The verdict includes a finding that defendant had full knowledge of all the facts when, after the examination of the witnesses and vouchers, it expressed its satisfaction with the proofs and promised to pay the money. The facts of the present case, with respect to the question of waiver, are much stronger against the insurance company than were the facts in the case of the *Pennsylvania Ins. Co. v. Kittle*, 39 Mich. 54, where the court, through Cooley, J., said:

"The question of waiver was submitted to the jury as one of fact, and they appear to have found that there was a waiver. The facts submitted were that after the loss the adjusting agent of the defendant called upon the plaintiff, and after investigation made an offer to pay, by way of compromise, \$375, at the same time objecting to the taking out of the second insurance. That this offer was declined, and the agent went away, and soon after wrote the plaintiff that she might go on and make out her proofs, and the matter would then be taken into consideration. That subsequent correspondence took place between the agent and the plaintiff respecting the proofs, the former demanding more particularity in what was furnished; and it was not until six months after the offer for a settlement was made that the agent notified the plaintiff, who in the mean time had been endeavoring to make the proofs satisfactory and to overcome the objections he was making thereto, that, 'in addition to the objections heretofore made,' the defendant would insist upon the forfeiture because of the second insurance. We think the jury were warranted in finding that the defendant, by calling upon the plaintiff to go on and make out her proofs, and by requiring her to be at the trouble and expense of correcting these to satisfy the criticism made by the agent, without giving her to understand that the company would rely upon the forfeiture, should be held to have waived it; and that, if it was the purpose all the while to insist upon it, the agent did not act towards her in good faith."

To the same effect many cases might be cited, but it is unnecessary to do so.

The case of *Shuggart v. Lycoming F. Ins. Co.* 55 Cal. 408, was put upon the ground that the policy contained an express provision that no agent was empowered to waive any of the conditions of the policy, either before or after loss, without express authority in writing from the company. The policy in suit contained no such provision. In the absence of such a provision the observations of the supreme court of the United States, in the case of *Insurance Co. v. Wilkinson*, 13 Wall. 222, are not inappropriate:

"It is well known," said the court, "so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one state, and having in that state their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured.

"The agents are stimulated by letters and instructions to activity in procuring contracts; and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this, and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy; the argument being that, as to all other acts of the agent, he is the agent of the assured.

"This proposition is not without support in some of the earlier decisions on the subject, and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own

motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to the system of selling policies through agents, which we have described, would be a snare and delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment as if they proceeded from the principal."

Under this rule, which we think the true one, the agents of the defendant were authorized, there being no provision in the policy to the contrary, to modify or altogether waive the condition of the policy with respect to the possession of the property; and there was no error in admitting in evidence Exhibit D. The jury was fairly instructed with respect to the law applicable to the facts.

Judgment and order affirmed.

We concur: McKEE, J.; MCKINSTRY, J.

(68 Cal. 321)

HARMON and others v. ASHMEAD and others. (No. 9,046.)

Filed May 20, 1885.

1. FORECLOSURE OF MECHANIC'S LIEN—PLEADING—EVIDENCE.

In an action to foreclose a mechanic's lien, a denial in the answer of an allegation in the complaint that certain claims of defendants are subordinate to plaintiff's lien, does not cast on plaintiff the burden of proving the allegation, as such denial, if it raise an issue, will make the issue one of which the defendants have the affirmative; and, if no evidence is introduced by defendants to support it, a finding that defendants' claim was subordinate to plaintiff's lien will be justified.

2. MECHANIC'S LIEN—STATEMENT IN.

A statement in a mechanic's lien that the building, in the construction of which the labor and materials were furnished, has been completed, is not necessary if it appear that the sum agreed to be paid therefor by the owner has become due.

Department 2. Appeal from the superior court of the city and county of San Francisco.

Foreclosure of mechanic's lien. The complaint contained an allegation that the defendants, except Ashmead, were mortgagees.

J. F. Cowdery and Wm. H. Fifield, for appellants.

E. S. Pillsbury, for respondents.

SHARPSTEIN, J. The denial in the answer of the allegation in the complaint, that the interests or claims of the defendants answering were subordinate and subject to the lien of the plaintiff, did not cast on him the burden of proving that allegation. If the defendants, in their answer to that allegation, had stated facts which showed that their claim was not subordinate or subject to the lien of the plain-

tiff, they would have had the affirmative of the issue; and it was their "business, when thus called upon, to disclose" the nature of their claim. *Anthony v. Nye*, 30 Cal. 401. By not doing so, they certainly occupy no better position than they would if they had done so. Conceding that the denial of the defendants raised an issue, we think it was one of which they had the affirmative, and as they introduced no evidence to support it, the court was justified in finding that their lien was subordinate and subject to the plaintiff's.

It is stated in the lien, and alleged in the complaint, that the defendant Ashmead agreed to pay for the materials furnished by plaintiff upon the completion of the building. And it is further alleged in the complaint that at the date of the commencement of this action the building had not been completed; and that said defendant did not intend to complete it; and that he had notified plaintiff to that effect. Thereupon the sum which said defendant had agreed to pay for said materials, doubtless, became due. It is unnecessary to state in a lien that a building, in the construction of which materials have been furnished and labor performed, has been completed: but the lien filed in this case did so state. That was doubtless done for the purpose of showing that the sum which the owner had agreed to pay for said materials had become due. The sum had become due, but not for that reason. There was a misstatement, but not of a material fact. In either event the sum claimed to be due, was due. And that was the material fact. Whether due for the reason stated in the lien, or for the one stated in the complaint, the rights of the parties would be the same. The law was sufficiently complied with, and nothing more should be required. We think the name of the owner of the premises is stated in the lien as fully as the law required it to be. In other respects we think the liens filed were substantially in conformity with the statute.

Judgment and order affirmed.

We concur: THORNTON, J.; MYRIOK, J.

(67 Cal. 45)

CONNIFF v. CITY AND COUNTY OF SAN FRANCISCO. (No. 8,543.)

Filed May 22, 1885.

MUNICIPAL CORPORATIONS—OBSTRUCTION OF WATER-COURSE BY GRADING STREET—DAMAGES—STATUTE OF LIMITATIONS.

A city has no authority, in grading a street, to stop by embankment a natural water-course, so as to detain the waters and force them back onto the lot of a private individual; and such act is a trespass amounting to a taking of his land, and constitutes a nuisance, and any legislation authorizing such a proceeding would, under the California constitution, be void. As no mode of compensation is provided for by statute in such cases, an ordinary action for the recovery of damages therefor may be maintained, and such action is not barred for three years from its accrual.

Department 2. Appeal from the superior court of the city and county of San Francisco.

J. F. Coudery and John Lord Love, for appellant.

Wright & Cormas, for respondent.

THORNTON, J. This action was brought to recover damages for injuries to plaintiff's lot and building, caused by grading Montgomery avenue in the mode provided for grading streets in the general statute in regard thereto. It is averred in the complaint that, in grading the street mentioned, an embankment was formed 15 feet above the plaintiff's property and the contiguous lots, by which the water that ran in a water-course crossing the street was permanently stopped in its flow, and backed upon plaintiff's lot, causing damage to it and the building thereon; that the street was thus made in accordance with the specifications furnished by the superintendent of streets, highways, and public squares, and under his direction and to his satisfaction; that this officer neglected and failed to have a culvert made in this embankment, by which the water which flowed in the water-course mentioned would have been carried off, which neglect and failure constituted a want of skill and neglect on the part of the superintendent in the construction of the street.

It appears from the bill of exceptions that on the trial the plaintiff proved the following facts:

"That the grading of Montgomery avenue, as alleged in the amended complaint, was completed on the twelfth day of June, 1879; that prior thereto there was a channel within about 200 feet of plaintiff's premises, through which the drainage or surface waters from the hills in the vicinity of said premises, discharged into the bay; that, when completed, the grade of said avenue formed a solid embankment across said channel, and obstructed the same, and prevented the water from flowing into the bay as formerly; that said embankment was, and is, about fifteen feet above plaintiff's premises; that immediately upon the completion of said grading, to-wit, on the said twelfth day of June, 1879, the drainage, or surface water, which had theretofore been discharged through said channel, flowed upon and flooded plaintiff's premises, and the said drainage or surface waters have ever since that time remained upon said premises; that at the time the said premises were so flooded the same were damaged."

If, upon these facts, and the inferences justly deducible from them by the triers,—for the jury not only find facts, but are authorized to find all inferences of fact justly to be deduced from the facts found, (*Shafter v. Evans*, 53 Cal. 32; *Sillem v. Thornton*, 3 El. & Bl. 873.)—the law is with the plaintiff, then the verdict, as regards any question arising on the facts, is unimpeachable, and the judgment must stand. Then, in considering these facts, we must also take into consideration all the inferences which the jury may justly have deduced from them.

Now, the facts referred to show a channel within about 200 feet of plaintiff's premises through which the drainage or surface waters flowed into the bay; that this channel was obstructed by a solid embankment built across it, about 15 feet above the plaintiff's property, which prevented the waters from flowing into the bay as formerly; that the water which flowed into this channel and were discharged

by it came from the hills in the vicinity of the plaintiff's premises; that, on completion of the embankment mentioned, the waters which had been prior to that time discharged through the channel were detained on plaintiff's premises, flowed upon and flooded them, and have ever since remained permanently upon them and damaged them. This improvement of Montgomery avenue, by grading it, was executed under the act of April 3, 1876. See St. 1875-6, p. 753, and section 19 of this act. This section provides for the awarding a contract for the work referred to by the board of supervisors of the city and county of San Francisco on the happening of an event designated in section 17 of the same act; and it is further provided in the same section that all the proceedings both before and after the awarding of the contract shall be the same as was at that time provided by law for the grading of streets in the said city and county. The act then in force regulating the grading of streets was the act of April 1, 1872, (see St. 1871-2, p. 804, 805, *et seq.*) in which the powers and duties of the superintendent of streets were defined, and to some extent those of the contractor. Under the provisions of this act the contractor must have performed the work of grading to the satisfaction of the superintendent of streets before he can procure an assessment to be made and a warrant issued for the compensation he is to receive. Section 9, Act 1872. The work is to be performed under the charge, superintendence, and inspection of the superintendent. Section 26 of the same act. The grading of streets of the city of San Francisco can only be done under an order of the board of supervisors.

The facts proved show that the embankment stopped the flow of the waters in the channel of usual escape, formed by the operation of natural causes, so that they were thrown back and detained on the lot of plaintiff, and caused the damage complained of. Can this be done? Conceding that a municipal corporation is not responsible for damage caused by the gathering of the surface waters, not running in a natural channel, produced by the raising of a street to the grade established by law, it does not follow that it would not be responsible herein. Here a natural channel is stopped,—one which, it may be properly inferred, had existed for a long series of years,—and the water thus dammed is forced to flow over a lot 200 feet distant from the channel. It is well settled that a municipal corporation has no right, in the absence of valid legislative authority, changing what would otherwise be the legal rights of the parties, to stop up a natural channel through which waters run, by an embankment made in grading a street, under its general power to grade and improve streets. See *Barron v. Baltimore*, 2 Amer. Jur. 203, cited, commented upon, and approved in *Stetson v. Faxon*, 19 Pick. 147; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Phinizy v. Augusta*, 47 Ga. 260.

An individual has no right to collect in artificial channels mere surface water and precipitate it upon the land of another. Nor has a corporation, whether public or private, the right to collect in such

channels mere surface water precipitated by rain or snow over large districts, and throw it upon the property of another. The cases to this effect are numerous, and may be found cited in a note to section 272 of Gould on Waters. We know of no principle of law which justifies either a corporation or individual in stopping up by an embankment or dam a natural channel by which surface waters escape, obstruct the natural flow of such waters, and cause them to run over and permanently remain on another's property. Such conduct would be a most flagrant trespass on the rights of another, in the shape of a direct invasion of his land, amounting to a taking of it within the rule laid down in *Pumpelly v. Green Bay Co.* 13 Wall. 166, occasioning inconvenience and damage to him, and thus constituting a nuisance. The case last cited from 13 Wallace is a direct authority for this conclusion. The action in this case was against a private corporation, here against one that is public and municipal; but we are not aware that there is anything in the nature or essence of the corporation known as the city and county of San Francisco, though public and municipal in its character, or in the statutes relating to it, which justifies it, even in the prosecution of a public work authorized by statute and for the public benefit, in taking the property of another. The former constitution of California, under which the work was done, as well as the constitution now in force, renders null all legislation purporting to authorize such a proceeding.

We take occasion to cite with hearty approval the following remarks of the supreme court of the United States in the case just referred to, speaking by MILLER, J.

"We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways for the public good there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other state constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those states. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it; and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the constitution; and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further."

See, also, Gould, Wat. § 243, and notes.

The case before us is not one of mere consequential damage which the land-owner must protect himself against, and for which the law affords him no redress. It is a direct trespass on the property of plaintiff by the construction of a dam which a moment's reflection

would have made clear to any one must inevitably, in the course of nature, have resulted in the permanent overflowing the land of plaintiff when the rainy season came, and from which he could only free himself by cutting away a public highway, for which he might have been proceeded against both by a civil and criminal action.

The cases of *Moulton v. Parks*, 64 Cal. 166, and *Green v. Swift*, 47 Cal. 536, have no application here. Nor is the case before us one where the damage has resulted from an error of judgment in officers to whose judgment the mode of grading the street was submitted by law for determination. It is a direct invasion of property rights, which no error of judgment can excuse or justify. Rights of property are assured by the settled principles of law, and are not at the mercy of the fallible judgment of men. The citizen or officer is bound to know these rights. If he violates them he must take the consequences. But it is said that the statute of April 3, 1876, above cited, provided for a compensation for the injury complained of to the plaintiff, and where that is the case an action like this cannot be maintained.

Conceding the legal consequence above stated to be correct; the question remains to be determined whether the act in question provides for compensation for the damage suffered by plaintiff. We are referred to the fifth section of the act by the counsel for defendant. The section is in these words:

"The county clerk of the city and county of San Francisco, within forty days after the passage of this act, shall publish for thirty days, in the official newspaper of said city and county, a notice simply stating that by an act of the legislature, approved on the _____ day of _____, eighteen hundred and seventy-six, (giving the date of approval of this act,) the grades of certain portions of Montgomery avenue and of certain portions of certain streets intersecting Montgomery avenue, in the city and county of San Francisco, have been changed, and referring to this act for further particulars; and requiring every person claiming damages by reason of said changes, within thirty days after the first publication of said notice, to file with the county clerk a verified statement, setting forth the description and situation of the claimant's property, its market value, and the amount of damages over and above all benefits which the claimant will sustain; and that, upon the failure of any person to file such statement within the prescribed time, his or her claim or right to damages shall be forever forfeited."

Every person claiming damages by reason of the changes of grade of the street (Montgomery avenue) was required by the above section to file his claim for such damages, within the time specified, with the county clerk, to be presented to commissioners, who were to pass on and determine the same; and, when so determined, provision was made by the act for their payment. See sections 5, 6, 7, 8, etc. The act was passed for the purpose of changing the grade of the street, and to provide for the grading and regrading of portions of it. See title of act. We have no doubt that the damages referred to, for which claims were to be filed, were such as might arise from the actual grading of the street by raising the surface thereof, by the deposit of earthy material on it, to the established grade, or by lowering it, by

taking off earthy material, to such grade; but certainly this had reference to the employment of the powers of the defendant corporation in grading in a lawful manner. It had no reference to the employment of such powers to the extent of embanking and damming a natural channel for the escape of waters, through which waters had flowed for many years, so that the waters thus obstructed would flow back on the property of another, and there remain permanently, covering such property and creating a nuisance. The property owner could not anticipate any such injury. Certainly the plaintiff here could not anticipate that such channel would be stopped up and obstructed so that a quantity of water would accumulate in a permanent pool or pond in sufficient quantity to overflow his lot distant about 200 feet from the channel. This was a consequence which could not be foreseen or counted on; nor would the commissioners to determine the damages under the act have allowed any claim for such damage. They would at once have seen that any such claim would be for damage not legitimately the result of grading the street,—not following from the lawful exercise of powers vested in the municipality, but for a trespass, which the city and its officers were restrained by law from committing. The law imposed on them no such duty, and the claim, in the proper and discreet exercise of their powers, must have been disallowed for the reasons above given. Neither the property owners nor the commissioners had before them the specifications of the work to be performed; for they had not then been framed. Under the act such specifications were not to be framed until some time afterwards. See sections 17, 19, of the act of 1876. For the reasons above given, they could not anticipate, nor even conjecture, that such specifications would call for an embankment damming the waters of a natural channel through which they had flowed for an indefinite period, to the injury of others, by causing the waters to flow back upon other property and permanently cover it.*

We are of opinion that such unforeseen and unanticipated damages consequent on the plan of grading adopted, not the result of grading the streets in a lawful mode to the modified levels, but the result of the mode of performing the work in a manner not authorized by law, were not contemplated or referred to in the statute, and, therefore, that no mode of compensation was provided for in the act for the character of damages complained of and suffered in this cause. See on this Gould, Wat. § 387, and notes. The contention of appellant on this point cannot be upheld. The defendant requested the court to direct the jury as follows:

"This action was commenced the second day of December, 1881. If the jury believe, from the evidence, that the damage to plaintiff's property occurred more than two years before the commencement of the action, he cannot recover."

This request was refused, and an exception was reserved. In no view that we can take of the proposition presented by the request can

we perceive that the court erred in refusing it. Under no circumstances did the action accrue for anything on the facts found until the twelfth day of June, 1879, and the plaintiff had three years from that date to bring his action. The act complained of was a trespass on real property, and the action for damages caused by it was not barred for three years from its accrual. See section 338, Code Civil Proc.

As the case presents a continuing nuisance, we are inclined to think that, like any other trespass on real property, a new cause of action arises each day during which it continues. *Bonner v. Welborn*, 7 Ga. 327; *Phinizy v. City Council of Augusta*, 47 Ga. 266. But it is unnecessary here to so hold, and we therefore refrain from placing the decision on such ground.

We find no error in the record; and the judgment is affirmed.

We concur: MYRICK, J.; SHARPSTEIN, J.

(67 Cal. 57)

MEHERIN v. OAKS. (No. 7,656.)

Filed May 22, 1885.

CHATTEL MORTGAGE—RECORDING OF—EFFECT OF ERROR IN.

A chattel mortgage is deemed recorded when it is deposited in the recorder's office with the proper officer for record, and an error of the officer in recording it does not affect its validity nor prevent its operation as a lien on the mortgaged property. *McKINSTRY and Ross, JJ.*, dissenting.

In bank. Appeal from the superior court of San Luis Obispo county.

W. H. Spencer, for appellant.

J. M. Wilcoxson, for respondent.

MYRICK, J. The question involved in this appeal arises under section 2957, Civil Code, which reads as follows:

"A mortgage of personal property is void as against creditors of the mortgagor, and subsequent purchasers and incumbrancers of the property in good faith and for value, unless (1) it is accompanied by the affidavit of all the parties thereto, that it is made in good faith and without any design to hinder, delay, or defraud creditors; (2) it is acknowledged or proved, certified, and recorded, in like manner as grants of real property.

The chattel mortgage was properly executed by Jones, and Jones to Meherin, and was accompanied by the affidavit required by law of all the parties, and was deposited with the recorder to be by him recorded. The recorder, in compliance with section 4242, Pol. Code, indorsed on the instrument the time when, and the book and pages in which, it was recorded. In recording the instrument, the recorder omitted to record the words, "and M. Meherin, the mortgagee," contained in the affidavit, so that, as the record made the instrument appear, the affidavit was signed by Meherin, but he did not join in the verification. The recorder also omitted to record the words "Notary Public" after the name of the officer taking the acknowledgment of

one of the mortgagors, and omitted to indicate that the seal of the notary was annexed to the certificate, although the instrument itself was complete in both particulars.

The defendant, as sheriff, seized the property by virtue of an execution in favor of one Preston against Jones, mortgagor, and the day following such seizure plaintiff gave notice to the defendant of the mortgage and of its place of record. The defendant disregarded the notice and sold the property. The appellant insists that he was entitled to stand on the notice imparted to him by the record, and that, as the record did not shew a valid mortgage, the fact that the mortgage itself was complete did not give plaintiff a lien; that the instrument was not a mortgage until recorded; and that it was incumbent on the mortgagee to see to it, not only that the instrument was properly executed, but that it was properly recorded.

Considering the section above quoted (2957) by itself, there would be much ground for the position taken; but the section says the instrument must be recorded in like manner as grants of real property. Referring to the Civil Code, concerning the recording of transfers of real property, we find in section 1158 that any instrument affecting the title or possession of real property may be recorded under chapter 4; and in section 1170 that "an instrument is deemed to be recorded when, being duly acknowledged or proved, and certified, it is deposited in the recorder's office with the proper officer for record." The mortgage, properly executed, having been deposited in the recorder's office with the proper officer for record, the mortgagee had done all that the law required of him to do. The defendant had actual as well as constructive notice that the plaintiff made some claim to the property, and he should have inquired whether or not the record spoke the truth. As the defendant made no offer to pay, tender, or deposit the amount due on plaintiff's mortgage, under sections 2968 and 2969, Civil Code, he was not justified in the seizure. *Wood v. Franks*, 56 Cal. 218.

We think the findings substantially cover the issues.

Judgment affirmed.

We concur: SHARPSTEIN, J.; MORRISON, C. J.; MCKEE, J.

We dissent: MCKINSTRY, J.; ROSS, J.

(57 Cal. 55)

PEOPLE v. McGILVER. (No. 20,069.)

Filed May 22, 1885

1. BURGLARY—EVIDENCE OF OWNERSHIP OF BUILDING—VARIANCE.

In a prosecution for burglary, committed in attempting to enter the house of H. Wempe, with intent to commit larceny, if on the trial G. Wempe testifies that his father owned the house, without giving evidence as to the first name or initial of the owner, it is competent for the jury to presume from such testimony that the name of witness' father is Wempe, and that for the purposes of the prosecution he was in possession of the building, and this will not constitute a variance, there being no proof that the elder Wempe's name was not H. Wempe.

2. SAME—EVIDENCE OF OTHER BURGLARY.

Evidence is admissible, in a prosecution for burglary to show that at the time of arrest the defendants were attempting another burglary, and also that there was found on the persons of defendants at the time of arrest part of the property taken from the room of the prosecutor, for the purpose of connecting the defendants with the first burglary.

In bank. Appeal from the superior court of the city and county of San Francisco.

John D. Whaley, for appellant.

E. C. Marshall, Atty. Gen., for respondent.

MYRIOK, J. The appellant, McGilver, was accused jointly with one Mark M. Lay, of the crime of burglary, committed by entering the house of H. Wempe, on the fourteenth of June, 1884, with intent to commit larceny. The appellant was separately tried. On the trial one G. Wempe gave evidence concerning the ownership of the house. He stated:

"My father owns the house." "It is my father's and mother's; my father owns the house;" "the deed runs to my father and mother; my father and mother both own the lot, and my father and mother built the house; my father and mother own the house."

No evidence was given as to the first name, or initial thereof, of the owner. The owner was spoken of in the testimony as Mr. Wempe. The point is made on this appeal that the owner's name should have been proved as laid, and that the omission to prove that H. Wempe was the owner is fatal. It was competent for the jury to presume from the evidence of G. Wempe that his father's name was Wempe, and that he was in possession of the building, for the purposes of the prosecution. It does not appear that the elder Wempe's name was not H. Wempe, as laid; therefore a variance does not appear. Sections 956, 1404, Penal Code; *State v. Black*, 31 Tex. 560.

It is claimed that the court erred in admitting evidence that McGilver and Lay, at the time of their arrest, were attempting to break into a jewelry store, a day or two after the burglary in question, and that the officers found burglars' tools in Lay's possession. In addition to the burglars' tools, the officers found on the person of each of the arrested parties articles which were identified as having been taken from Wempe's house. We see no error. The evidence tended

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to connect the parties with the Wempe burglary, and for that reason was admissible.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MCKINSTY, J.; ROSS, J.; MORRISON, C. J.; MCKEE, J.

(67 Cal. 32)

WOOD v. FRANKS. (No. 8,326.)

Filed May 19, 1885.

1. PARTNERSHIP—ASSIGNMENT OF NOTE BY—RIGHTS OF ASSIGNEE.

Where the members of a firm prior to the making of a note to them, to secure which the mortgage in controversy was executed, agreed that plaintiff should take an assignment of the note, and that the amount of the note should be charged against him on the firm books, and the note was so assigned, but not charged on the firm books against him for some time afterwards, the plaintiff became the actual owner of the note, by virtue of such agreement, at the time that he indorsed the note to himself in behalf of the partnership.

2. INSOLVENT DEBTOR—ASSIGNMENT BY.

A debtor, though admitted to be insolvent, is not prevented by the California insolvent act from making a transfer directly to his creditor, either as security for a mortgage or in payment of his debts absolutely.

3. CHATTEL MORTGAGE—FRAUD IN, QUESTION FOR JURY.

A chattel mortgage, given to secure both a present indebtedness and future advances, being for a greater sum than due the mortgagee, is not fraudulent as to creditors, though the mortgage does not, on its face, show that it was given, as to the excess over the amount due mortgagee, to secure future advances, and the question whether such mortgage was fraudulent, or was in good faith given to secure future advances, is a question for the jury.

Department 1. Appeal from the superior court of Monterey county.

A grain crop of one Heron had been attached. Plaintiff at that time had a mortgage on that crop, and claimed of the sheriff the amount of his mortgage debt and interest, and the present action was brought to recover the same.

Wm. H. Webb, J. A. Wall, and D. M. Delmas, for appellant.

S. F. Geil, S. M. Swinnerton, and Garber, Thornton & Bishop, for respondent.

By THE COURT. 1. The complaint is not subject to general demurrer. *Wood v. Franks*, 56 Cal. 217.

2. It is contended that plaintiff acquired no rights through the mortgage, because no consideration passed for the transfer of the note from Wood, Dutcher & Co. to the plaintiff; in other words, that the plaintiff was not the actual owner of the promissory note which the mortgage was given to secure, or of the indebtedness by it represented. There was evidence tending to prove that prior to the making of the note by Heron to the partnership, Wood, Dutcher & Co., it was agreed, between plaintiff and the other members of the firm, that plaintiff should take an assignment of the note, and that its amount should be charged against him. The note was indorsed to plaintiff before the mortgage was executed, but he did not charge himself with

it, on the books of the firm, until several hours afterwards. By reason of his promise that he would take the note and charge the amount of it against himself, he became liable to the firm for that amount when he, in the name of the partnership, indorsed it to himself. The entry in the firm books was but further evidence of an indebtedness to the firm already existing.

3. If the instrument, executed and delivered by Heron to the plaintiff, had been made to secure only—*First*, the payment of the note to the Salinas City Bank, made by Heron and plaintiff, the latter as surety; and, *second*, the debt from Heron to Wood, Dutcher & Co., assigned to plaintiff,—it would not have been an attempted “assignment,” within the meaning of the word as used in part 2, tit. 8, of the Civil Code; nor could it have been an attempt to create a trust, for the use of the mortgagor, such as is prohibited by the statute of frauds. *Dana v. Stanford*, 10 Cal. 269. The statutes were not intended to prevent a debtor, admittedly insolvent, from transferring his property directly to his creditor, either absolutely in payment of his debts, or as security by way of mortgage.

In *Lawrence v. Neff*, 41 Cal. 566, it was held that the instrument therein spoken of, if considered a mortgage, was valid as to creditors not referred to in it,—at least, to the extent of creating a lien in the amount of the debt due to the mortgagee,—although it was given, as appears on its face, to secure other creditors than the mortgagee. This much is involved in the decision of that case, even if those parts of the opinion which in terms declare that the instrument was not an “assignment,” under section 39 of the insolvent law of 1852, should be disregarded as mere *dicta*. The effect of the judgments in the two cases above cited is to determine that the instrument before us is not an attempted “assignment,” which as an entirety is *void*, because made without the assent of the attaching creditor.

4. The verdict includes a finding that the mortgage was executed without any intent to hinder, delay, or defraud the attaching creditor, and there was evidence to sustain the finding.

5. The mortgage is accompanied by the affidavit and acknowledgment required by section 2957 of the Civil Code. It is urged, however, that the transaction was a legal fraud as to the attaching creditor, because the note and mortgage were given for a larger sum than was due to the mortgagee. When the mortgage was executed, neither Alexander nor Goodall, Perkins & Co. had assented to the arrangement entered into by plaintiff and Heron, nor had they agreed to look to plaintiff for the payment of their claims against Heron. Before the attachment was levied, however, they had actually received from plaintiff the full amount previously due from Heron to each of them, respectively.

The excess provided for in the mortgage—beyond debts due from Heron, the mortgagor, to plaintiff—was made up of debts due from the mortgagor to Alexander and to Goodall, Perkins & Co., which

plaintiff, the mortgagee, promised to pay. Fairly construed, the contract between Heron and the plaintiff was that the instrument should constitute a lien for the sums due the plaintiff, and should become a lien for the additional sums due from Heron to Alexander and Goodall, Perkins & Co., when the plaintiff should pay the same, or, with the assent of those persons, relieve Heron of all obligation to pay them. It was a mortgage for a sum definite, and for advances of other definite sums to be made for the benefit of the mortgagor by being applied to the payment of certain of his debts. A mortgage of personal property, given for a greater sum than is due by the mortgagor to the mortgagee, to secure both a present indebtedness and future advances, is not fraudulent in law as to the creditors of the mortgagor, because given for a greater sum than is due, even though the mortgage does not express upon its face that the excess is for future advances. And the question whether a mortgage, given for a greater sum than was due, was given in good faith, both for a present indebtedness and to secure future advances, is one of fact for the jury, under proper instructions from the court. *Tully v. Harloe*, 35 Cal. 302.

The mortgage—made in good faith, as found by the jury—was valid when it was executed, as between the parties to it, and as against the creditor who subsequently attached. It follows that the lien, originally for the amount due to the plaintiff, was increased as the contract between the mortgagor and mortgagee was carried out by the payment of the several sums by the mortgagee agreed to be paid to certain creditors of the mortgagor. When the attachment was levied, the mortgage was a valid lien in the amount to secure which it purports to have been made, as the sums which (together with the sum due to the mortgagee when the instrument was executed) make up that amount had actually been paid.

Judgment and order affirmed.

SUPREME COURT OF OREGON.

(13 Or. 28)

TUCKER v. SALEM FLOURING MILLS Co. and another.

Filed April 27, 1885.

1. BILL OF EXCEPTIONS—CLEARNESS NECESSARY.

A bill of exceptions should set forth in clear and precise terms the matters whereupon a review by the higher court is desired.

2. INJURY TO PROPERTY—EVIDENCE—PRESUMPTION—PROOF COVERING TIME NOT IN THE ACTION.

The fact, that evidence has been permitted to be given in a case of injury to property prior to the time set forth in the complaint, does not raise the presumption that the damages subsequently awarded by the jury referred to that injury.

3. SAME—PRESCRIPTION—LIMITS AS TO RIGHTS UNDER LAW OF.

If a party has acquired by prescription the right to divert water so that it flows into a creek running through his neighbor's land, such prescriptive right does not extend to the overflowing of the water over such land to the neighbor's injury.

4. TRIAL—WORDS IN PRESENCE OF JURYMEN—DISCRETION OF COURT UPON MOTION.

If a party to a suit discuss the merits of his case in the presence of one of the jurors, the fact should be called to the attention of the court at once; but, in any event, the disposal of any motion thereupon made must rest in the discretion of the trial court.

Shaw & Burnett and T. I. Ford, for appellants.

Bonham & Ramsey, for respondent.

THAYER, J. This appeal is from a judgment of the circuit-court for the county of Marion, rendered in an action in favor of the respondent and against the appellants, for damages to real property, caused by turning a supply of water from the Santiam river into what is known as "Mill Creek," thereby causing the waters thereof to overflow its banks and inundate about 50 acres of the respondent's farming lands, and which caused it to remain too wet for the purposes of husbandry for the two years next prior to the time of the commencement of the action. The case was tried by a jury, and resulted in a verdict for the respondent for the sum of \$500, upon which the judgment appealed from was entered.

The appellants have assigned several matters as error, upon which they insist that the judgment should be reversed. The first point is that the respondent was permitted to show that his land was overflowed by a slough, through and into which the waters of Mill creek had been turned by a party named Turner. This evidence was objected to, upon the grounds that it was alleged in the complaint that the damage was caused by the overflowage of Mill creek instead of this slough, and that said Turner had occasioned it, and not the appellants. The statement in the bill of exceptions is so general that this court cannot determine, with any degree of certainty, as to the competency of the evidence. If the respondent's land was overflowed in consequence of the act of Turner, and not of that of the appellants,

then it was error to allow proof thereof to be given in order to establish a liability against the latter. But it is not shown where or under what circumstances the water had been turned into the slough, nor how that affected this case. For all that appears, Turner may have been acting for and under the direction of the appellants when he diverted the water from the creek into the slough. And the overflow may have been occasioned by the amount of water the appellants turned into Mill creek from the Santiam river. The fact that the water ran from the slough into the respondent's land, instead of running directly from the creek, was immaterial. The variance between the testimony and the allegations of the complaint in that particular could not have prejudiced the appellants. There may have been error in admitting the evidence, but it does not so appear. Error must be affirmatively shown. The presumption is that a judgment has been regularly recovered. In order to overcome such presumption in this case, the appellants must show from the record that the overflow of the water complained of was caused by Turner's diverting it, and not in consequence of their turning water from the Santiam river into the creek.

The second point is that witnesses were allowed to testify that the respondent's land, alleged to have been damaged, was flooded and damaged by the appellants prior to the two years alleged in the complaint. This exception is subject to the same difficulty as the former one, in not being explicit. The testimony as to the overflow of the land would necessarily be directed to the fact as to when it took place. It might have occurred two or five years prior to the time of the commencement of the action. However that may have been, the respondent, under his complaint, could only recover damages which it had occasioned during the two years next preceding that time; and if the court permitted him to recover for damages to the land accruing prior to that period, it would have been error. But it does not necessarily follow that because the court allowed evidence showing that the land was flooded and damaged prior to the two years, that the respondent was allowed to recover for such damages. Such evidence may have been, and doubtless was, permitted as a part of the respondent's general evidence in the case, and not with a view of recovering damages in the action. When such evidence got into the case, the court should have been requested to instruct the jury not to consider it in making up their verdict; and the court very likely did so instruct, without being requested. Again, it is not shown to what extent the evidence of such damages was allowed to be given. It may only have shown nominal damages. In that case it would not have been of sufficient importance, in any view, to require a reversal of the judgment; it would only have added a nominal sum to the amount of the recovery, which the law would not regard, upon the maxim, *de minimis non curat lex*.

The third point relates to an instruction of the court to the jury that

a verdict should be found for the respondent if it appeared from the testimony that the appellants had, within the last two years, turned into said creek such an amount of water as would have overflowed upon the respondent's land had the water flowed down Mill creek, as originally designed by appellants' predecessors, instead of flowing down the course to which it was averted by said Turner. The objection urged to this instruction seems to be that the jury were made to understand that they could consider any act of diverting the water by the appellants up to the time of the trial of the case, and award damages occasioned after the commencement of the action. The instruction had no reference to damages; it referred entirely to the right to recover generally. The first question for the consideration of the jury was as to whether the respondent should have a verdict at all. If they concluded he should, then the next question would be as to the amount. But would the jury have been likely, under the instruction, to have believed that they had the right to consider the acts of the appellants in diverting the water at any time after the action was commenced, or any damages that accrued after its commencement? They had the pleadings in the case before them when they made up their verdict; and did they not know that the acts complained of, and the damages arising therefrom, referred to acts done and consequences which had resulted at a period anterior to the time the action was commenced? I think that a jury of good and lawful men would very readily understand that they were impaneled to try the issues made in the pleadings, and not to determine some matter that had occurred after the pleadings had been drawn; that if the court instructed them as to their duty in case they found from the testimony that certain acts had occurred "within the last two years," they would infer at once that the two years prior to the commencement of the action were intended, and not the two years next prior to the time the instruction was given. If the instruction had been that the jury might consider acts committed or damages suffered subsequent to the commencement of the action, it would of course have been erroneous; but the court evidently did not intend the instruction to be so construed, nor does the language used import such meaning.

The fourth point relates to the instruction given by the court, to the effect that if the respondent never agreed that the appellants might overflow his land, and never acquiesced in its being flooded, then the appellants' plea of the statute of limitations should be dismissed by the jury. This instruction was inartificially drawn, but I hardly think it erroneous. The appellants set forth in their answer a prescriptive right to have water flow from the Santiam river into Mill creek in the same or greater quantity than flowed there at the time of the alleged commission of the damages, and the instruction evidently had reference to that part of the answer, although the words "statute of limitations" were used. Whether the facts proved authorized any such instruction or not, we cannot determine,

as they are not set out in the bill of exceptions; but the instruction, in view of the fact that prescription is often confounded with the statute of limitations, could not have injured the appellants' case, even if not technically correct. The jury, doubtless, knew how it was intended to be applied, and I cannot discover how they could have been misled to the appellants' prejudice, although the language was not well chosen. I imagine there was no evidence justifying such instruction; but we are not, of course, at liberty to assume that.

The fifth ground of error assigned includes the instruction given by the court to the jury to the effect that if they found from the testimony that, during the last two and one-half years, the land of the respondent had been flooded to a greater extent than ever before, then the appellants' claim of a right to overflow said land on the ground of a right by prescription should, so far as the increased flowage was concerned, be dismissed by them when finding their verdict. This instruction was clearly correct, and pertinent to the issue. It went directly to the point. The appellants may have acquired a prescriptive right to raise the water in Mill creek to a certain stage, but that would not give them the right to raise it higher, unless they had been in the uninterrupted enjoyment of the latter right for a period at least equal to the statute of limitations.

The sixth and last ground assigned as error is the refusal of the court to grant a new trial upon the grounds that the respondent had, in the presence of one of the jurymen, while the case was on trial, conversed in regard to the matter. It is alleged that he said to one Porter, in the presence of such jurymen, that the appellants had taken all his property, and that thereupon said Porter said they (referring to appellants) had destroyed respondent's place. The circuit court heard the motion upon affidavits and counter-affidavits, and denied it. It is highly improper for a party or any person to make remarks concerning a case, when on trial before a jury, in the presence of any of the jurors; and whenever such practice is indulged in, the judge presiding at the trial should unhesitatingly set aside a verdict in favor of a party who had been guilty of such misconduct. A jury trial would be a miserable farce if the jurors were permitted to be tampered with in any manner whatever. Such trials should be kept entirely free from all suspicion that influences of that character had been exercised to any extent. The granting of a new trial, however, in such a case, is a matter addressed to the discretion of a trial judge, and his decision cannot be reviewed by this court unless there has been an abuse of discretion; and we cannot reasonably conclude that there was any such abuse in this case. The circuit judge was in a much better situation than this court is, to determine the question. He understood better the circumstances under which the conversation took place in the presence of the juror, the nature of it, and its effect upon the case. Besides, there is much force in the position of the respondent's counsel, that the affair should have been presented to

the court at once. One of the appellants' attorneys was present when the respondent made the remark, which was in fact a reply to a remark made by the attorney, and he should have called the attention of the court to the matter as soon thereafter as the court convened, but it was allowed to rest until the trial was concluded and the jury had returned their verdict.

The record fails to disclose error, and the judgment, therefore, is affirmed.

(12 Or. 280)

MOORE v. KNOTT and another.

Filed May 11, 1885.

PARTNERSHIP—DISTRIBUTION OF PROCEEDS OF SALE OF FIRM PROPERTY—REVIEW OF THE CASE BY COURT, AND BASIS OF DISTRIBUTION DETERMINED.

Appeal from Multnomah county.

George H. Williams, for respondent *Anthony Moore*.

Alfred Sears, Jr., and *R. Williams*, for appellant.

H. T. Bingham, for respondent *Knott*.

THAYER, J. This appeal is from a decree of the circuit court for Multnomah county. The respondent *Moore* commenced a suit against the respondent *Knott* and the appellant, *Estes*, in that court for an accounting arising out of partnership affairs between the parties. It appears from the transcript that said parties, on the fifteenth day of April, 1882, entered into written articles of copartnership in the steam saw-mill business for the purpose of manufacturing and selling lumber. The partnership was to continue for the period of 10 years from the first day of March, 1882, and be binding upon the legal representatives. The saw-mill was to be erected on the premises known as the "Nicolai Mill," at Albina, in said county, and *Knott & Estes* were to allow the firm the use and occupation of the premises under lease, which the articles stated were then held by said *Knott* from *Nicolai*. Said *Knott & Estes* were to pay all rent and other taxes and expenses agreed to be paid by the lessee under said lease without charge to the firm; the partnership to pay the taxes against the mill and machinery. Said *Knott & Estes* were also, at their own cost and expense, to make an addition of 18 or 20 feet to the east end of the mill building for the edger. *Moore* agreed, at his own cost and expense, to take down the mill then standing on the McNulty creek, back of St. Helen's, in Columbia county, Oregon, and at his own cost and expense to move the boiler, engines, and all the other machinery pertaining to said mill, and also the blacksmith tools and appliances, to said *Nicolai* mill premises, and there erect the same at his own cost and expense, and put said engine and machinery, and the blacksmith shop, in good running order; but that if, at any time during the continuance of the said partnership, it should be deemed expedient by all the partners, or their representatives, to make additions

to said mill building, or to purchase and operate other additional machinery therein, that such addition should be built and such additional machinery be purchased at the joint cost of all the partners, each to pay ratably his proportion of one-third thereof. Said articles also contained the following clause, viz.:

"In case of a sale of the mill and lease at any time before the expiration of the time to which the partnership is limited, the proceeds of such sale shall be divided equally between the partners; but if the said mill and lease is not disposed of during said partnership, then, at the end of ten years, Anthony Moore shall have and then retain all the machinery, engines, boilers, etc., put into the mill by him; and such additional machinery as may have been purchased and put into the mill shall be sold, and the proceeds of the sale shall be divided equally between the partners."

It was further stipulated therein that in case of the destruction of the mill by fire the partnership should at once terminate, and the said Knott & Estes should become again solely entitled to the benefits of the lease for the remainder of the term. There are also many other provisions in said written articles, but it is not necessary to refer to them for the purposes of this decision. The said parties, after concluding the said articles of copartnership, engaged in the business therein mentioned, and prosecuted it until March 13, 1883, when the partnership was dissolved. That the said Moore, in pursuance of the said articles, took down his said mill, and at his own cost and expense moved the said boiler, engines, and other machinery to said Nicolai mill premises, and put the same in good running order. That on or about the said thirteenth day of March, 1883, said parties sold the said mill and machinery for the sum of \$16,000. It was claimed by said Moore that said sum was received by the said Knott, and the further sum of \$1,418.25 on account of the sale of certain wood and lumber belonging to the said firm, and also that prior to and at the time of the sale of said mill it was agreed by the said Knott, with the knowledge and consent of said Estes, to pay him from said proceeds of said sale the sum of \$6,400 on account of his said boiler, engine, and the other machinery so furnished by him and erected in the said mill; and it was claimed by the said Estes that by an arrangement made between him and Knott, soon after the formation of the partnership, he acquired the interest of Knott therein, and that he was, at the time of the dissolution of the firm, the owner of a two-thirds interest in the said business, subject to debts and liabilities in favor of Knott. He claimed, also, that there had been an account started between the parties, and a balance struck, by which there was found due to said Moore \$1,660.72, to said Knott \$6,424.30, and to himself \$5,012.44.

Several other issues were involved in the case between the parties, which it is unnecessary to notice. The suit was referred to a referee to find the facts and conclusions of law, and upon whose report the decree appealed from was entered. The following are the findings of fact and law reported by the referee, viz.:

"*First.* That on or about the fifteenth day of April, 1882, the plaintiff and the defendants entered into an agreement of copartnership in the saw-mill business at Albina, Oregon, for a period of ten years from March 1, 1882, under articles of copartnership as stated in the plaintiff's complaint herein. *Second.* That prior to the formation of said partnership, the plaintiff, together with others, was owner of certain mill machinery then situate in Columbia county, Oregon. *Third.* That under and by the terms of said copartnership agreement, the said plaintiff removed said machinery from said Columbia county to the mill of said parties at Albina, Oregon, and performed work and labor in placing the same in said mill, all of which was of the value of about \$6,100. *Fourth.* That said partnership business was unsuccessful, and on or about the thirteenth day of March, 1883, it was mutually agreed by and between all of said partners to discontinue said business, and sell out all of said partnership property, if a purchaser could be found at a price which would repay to said Levi Knott his advances made to said firm, with interest thereon, and repay to said plaintiff the cost of the machinery placed by him in said mill, together with the work done by him in so constructing and placing the same. *Fifth.* That on or about said date an offer of sixteen thousand dollars was made for said mill property by J. S. Cochran, and it was thereupon mutually agreed, by and between said partners, to accept said offer, and sell said property at said price, and apply the proceeds in the manner so agreed upon. *Sixth.* That in consideration of said agreement, the said copartners did, upon the — day of March, 1883, sell and convey to said Cochran the said mill property for said sum, and also, at or soon after said date, sold all lumber and wood belonging to said firm for the sum of \$1,418.25. *Seventh.* That up to the time of said sale the said Levi Knott had made advances of money to said firm in the amount of \$6,165.00, over and above all assets, and there was due and owing to him from said firm the said sum of \$6,165.00. *Eighth.* That at said date the said plaintiff was owing the firm a balance of \$1,103.84; and the cost of mill machinery furnished by him, and his work, was \$6,100.00. *Ninth.* That at the same date the same Estes was indebted to the firm in the sum of \$855.64 over and above all credits. *Tenth.* That since said sale said Knott has received of the proceeds of the same, and the sale of lumber and wood, the sum of \$16,323.67, and has paid debts of the firm amounting to \$5,964.55, leaving in his hands the sum of \$5,498.86, over and above all his expenditures and claims against said firm. *Eleventh.* That since said sale the said Anthony Moore has received of the proceeds thereof the sum of \$1,094.58, leaving the amount due him in the sum of \$3,901.58. *Twelfth.* That since said sale said Estes has collected of amounts due to said firm the sum of \$361.25, and has paid of the firm debts \$15.94, leaving the amount of his debt to the firm at \$1,200.82. *Thirteenth.* That the surplus on hand after payment of the respective claims of Knott and Moore, and after payment of all debts, save and except the costs of this suit, is \$1,581.79. That, as between defendants Estes and Knott, there was no contract or agreement that the said Estes should have the said interest of Knott in the copartnership, and the said Knott retained his interest in said firm as a copartner under the articles of copartnership up to the time of the dissolution thereof."

As conclusions of law:

"That the plaintiff is entitled to a decree decreeing that the defendant Knott pay to the plaintiff the sum of \$3,901.58, and the further amount of one-half of what shall remain of said surplus of \$1,581.79 after payment of the costs of suit out of the same, and that the plaintiff and said defendant Knott each have judgment against the defendant Estes for an amount equal to the one-third of what shall remain after deducting one-half of said surplus (after the payment of the costs thereof) from said amount of \$1,200.82."

There is an evident error in the result found by the referee as to the amount of money in the hands of Knott at the date of his report. The amount of money Knott received was \$16,000 for the mill, and \$1,418.25 for wood and lumber. From this, Moore received \$1,094.58. Knott then had remaining the \$16,323.67 as recited in the tenth finding of fact. From this take the advances Knott had made up to the time of the sale,—\$6,165,—and the \$5,964.55 he had paid debts of the firm since the sale, amounting to \$12,129.55, and it does not leave in his hands \$5,493.86, but \$4,194.70. Nor do we agree with the referee in his fourth and fifth findings of fact, so far as they find that it was mutually agreed between the said partners to sell out the partnership property and repay Moore the costs of the machinery placed by him in the mill, or to apply the proceeds of such sale to such purpose.

The evidence was sufficient to authorize the referee to find that Knott was willing that Moore should have all the proceeds of the sale of the partnership property after the debts of the firm were paid, but it nowhere appears that Estes consented to any such arrangement. The fact is that Moore and Knott ignored Estes in the transaction; but they had no right to do so, in view of their stipulation in their articles of copartnership hereinbefore set out. By that clause in the articles, Estes was entitled, in case of a sale before the expiration of the 10 years, to an equal division of the proceeds thereof, and he certainly could not be deprived of it unless he had relinquished that right for a valid consideration. Moore's and Knott's agreement upon the subject could not bind Estes without his express assent. The stipulation conferred upon him a property right which he alone could dispose of. Knott was not his guardian or agent for the purpose of releasing the right he had secured under the contract of copartnership. Knott was willing to give to Moore his interest in the assets of the concern; and we think he did, according to the weight of the testimony, agree that the proceeds of the sale should, after the debts were paid, be applied upon Moore's claim; but Estes was unaffected by the arrangement.

It was claimed by Moore's counsel upon the argument that Estes had assigned his interest in the partnership to Knott. It appears that Estes did, on April 27, 1882, assign to Knott the lease of the premises from Nicolai to him, and that at the same time Knott agreed to reassign the same. The recital in the former agreement is to the effect that Estes was indebted to Knott for certain sums of money advanced, aggregating \$500, and that Knott had agreed to make other advances for Estes, and that to secure the money advanced and to be advanced the assignment was made. This transaction could only operate as a mortgage of the leasehold interest Estes had in the premises, and had no effect upon his relations as a partner in the business. On the other hand, Estes claimed that the transaction was evidence that Knott owned no share in the concern, but that he (Es-

tes) owned a two-thirds interest thereof. This view cannot be maintained any more than the other. The articles established the respective interests of each partner, and Estes can no more avoid the effect than Moore can. Each of the parties would have been entitled to a third interest in the assets of the firm had not the agreement between Knott and Moore been made, by which Moore was to have all the assets, including, not only the portion the former would have been entitled to, but that which Estes was entitled to as well. That agreement bound Knott's portion of the assets, but not Estes' portion thereof. The claim of Estes that there had been an account stated is not supported by the proof.

The decision of this court is that, from the moneys in Knott's hands,—the \$4,194.70,—the costs and disbursements in the case, including that which was incurred in the circuit court and in this court, be paid; that the remainder be added to the sum of \$2,198.42, the amount Moore owes the firm, and to the sum of \$1,200.48, which Estes owes the firm, and one-third of such total amount, less said \$1,200.48, be paid to said Estes, and the other two-thirds of such total amount, less the said sum of \$2,198.42, be paid to the said Moore, and that upon such payment being made the said Knott be wholly exonerated from further liability on account of said moneys in his hands as aforesaid; that the decree of the circuit court be modified so as to conform to the principles of this decision.

Let a decree be entered herein in favor of the said Estes and the said Moore, respectively, and against the said Knott, for the respective amounts they are entitled to of the said moneys as herein determined, whenever the costs and disbursements are taxed, so that they can be ascertained.

SUPREME COURT OF WASHINGTON TERRITORY.

(2 Wash. T. 155)

MERRITT v. KENWORTHY and others.

Filed August 24, 1882.

MORTGAGE—FORECLOSURE—ANSWER—CONDITIONAL CONTRACT—NECESSARY ALLEGATION.

A party who has purchased land under an alleged conditional contract, and given a mortgage on the land to secure the deferred payments, cannot, afterwards, in an action to foreclose, avail himself of such contract without first doing his utmost to place all parties in the same situation as when the contract was made, and alleging that he has so done, in his answer.

Hall, Jones & Osborn, for plaintiff.

Jacobs & Jenner, for defendants.

HOYT, J. In an action brought to foreclose a mortgage, given to secure certain notes executed by the defendants, an answer was interposed alleging certain facts, which, briefly stated, were that said notes and mortgage were given in payment for a piece of land bought by defendant Mary E. Kenworthy of the plaintiff; that at the time of the sale of such land plaintiff made and delivered his own deed therefor to said defendant, but that, as he had a wife who had a dower interest in said land, it was agreed that said sale should not be considered complete until another deed should be executed by plaintiff, in which his wife should join, and that plaintiff agreed to procure the execution of such additional deed within one year, and that said notes and mortgage were made and delivered to plaintiff conditionally, and not to take effect and be in force until the execution and delivery of such second deed, and that if such deed was not executed within said one year, that then said notes and mortgage should be void and of no effect; that upon the delivery of such first deed, and the said notes and mortgage, the defendants went into possession of the premises, and had made improvements thereon, and were still in possession thereof; that said second deed had never been executed, though more than the said one year had elapsed; and the said answer, by way of relief, asked that plaintiff's complaint be dismissed, and that they have judgment for \$1,000 damages.

It was not alleged in said answer that the evidence of said conditions existed other than in parol. To this answer the court below sustained a demurrer, and this is the particular error which the defendants allege. The notes upon which the action was brought provided that the interest thereon should be paid monthly in advance, and it is claimed that the contract set up in said answer, which, in effect, might postpone any payment on said notes for a year, would change the terms thereof, and therefore not be competent to be shown by parol, and that, therefore, such answer was bad; and we are of the opinion that there is much force in their position; but, as we think that all the facts alleged in the answer (if said conditions had been

alleged to have been in writing) would constitute no defense to plaintiff's action, we do not now decide as to whether or not the alleged contract was one which could have been shown by parol.

Defendants, by their said answer, admit that they received certain title from the plaintiff, and that they are in possession of the premises thereunder, and that the notes and mortgages were given for the purchase price of said land; and, without in any way offering to reconvey the title so obtained from plaintiff, or to surrender to him the possession of the premises, they seek to set up in a court of equity the conditional contract above stated, to defeat plaintiff's entire action. For them to do this would, in our opinion, be a clear violation of the rule that he who seeks equity must do equity, and the court cannot, therefore, allow them to avail themselves of such conditional contract unless they had first done all they could to place all parties in the same situation as when the contract was made, and had so alleged in their answer.

The demurrer was properly sustained, and the judgment rendered in the court below must be affirmed, with costs. Let the cause be remanded, with instructions to the court below to carry into effect the judgment heretofore rendered therein.

GREENE, C. J., concurs.

(2 Wash. T. 147)

HILL v. TERRITORY *ex rel.* EVANS, Dist. Atty.

Filed July, 1882.

1. LEGISLATIVE POWER OVER THE ORGANIC LAW—TERRITORY OF WASHINGTON.

The legislature of the territory of Washington cannot change or amend a provision of the organic law of the territory.

2. ARMY OFFICER—ELIGIBILITY TO TERRITORIAL OFFICE—RETIRED OFFICER.

An officer of the United States army, whether in active service or retired, is ineligible to hold an office under the laws of Washington Territory, and any votes cast at an election for such officer, under the circumstances, should not be counted, but are null and void.

J. R. Lewis, for plaintiff in error.

Elwood Evans, for defendant in error.

HOYT, J. By the pleadings in this cause it was admitted that the plaintiff in error, the defendant below, was declared elected to the office of treasurer of King county in November, 1880, and that in pursuance of such declaration he entered into and took possession of said office, and entered upon the discharge of the duties thereof, and that he is still so in possession of said office. It was also admitted that at the time of said election said defendant was and still is an officer upon the retired list of the United States army, and the question decided below, and to be decided here, is as to whether, under the facts so admitted, judgment of *ouster* should be entered against said defendant.

Upon the argument here, two points have been relied upon by counsel for said defendant:

(1) That said defendant does not belong to the army in such a sense as to come within the inhibition of section 1860 of the Revised Statutes of the United States, and that he is, therefore, not ineligible to said office. (2) That though he is ineligible, yet the action cannot be maintained against him, on the part of the territory, for the reason that it is a law of the United States, and not of the territory, that is being violated.

Let us examine these points; and, as a matter of convenience, we will discuss the second proposition first.

It is virtually conceded, by the argument upon this point, that, under the law of the territory as it stood prior to the amendment made thereto in 1881, the territory would have been the proper party plaintiff; but it is contended that the action of the legislature in so amending said law that it was no longer a violation thereof for an officer on the retired list to hold such office, had so changed the relation of the territory that it no longer had any interest in the question; as, if the laws of the United States only were being violated, they, and not the territory, were the proper parties plaintiff. But if we concede the entire argument of the defendant upon this question, it would not then appear that said amendment could have any effect upon this cause, for this action was commenced before said amendment was made, and the rights of the parties, as they existed before the enactment of said amendment, were protected by the provisions of the act which contained said amendment. But, in our opinion, said amendment could have no influence upon this case, even if rights had not been protected as above stated, for the reason that said section 1860 is a part of the organic law of this territory, and, as such, of as full force and effect therein as an act of its own legislature, with the additional sanction that it is beyond the power of said legislature to change or modify the same; besides, we think that the territory has an interest in seeing that its officers are not violators of any law, whether of its own enactment or the enactment of congress; as the act of the officer would be equally culpable, whether by holding an office he violated a law of the United States or this territory.

Again, at the time of the election of the defendant to said office, he was, if he belonged to the army of the United States, ineligible thereto by the laws of the territory; hence all votes cast for him were of no effect, and the declaration of his election could confer no rights upon him; and if all laws that rendered him so ineligible were afterwards repealed, such repeal could not, in itself, validate said election, and confer upon him the right to hold said office until he had been legally elected or appointed thereto. We think that the action was properly brought in the name of the territory, and that no change of the law has been made which can prevent the territory from prosecuting the same to final judgment.

As to the other question above stated: The language of said section 1860, so far as it is material to this inquiry, is as follows: "No person belonging to the army or navy shall be elected to or hold any civil office in any territory." Does an officer upon the retired list belong to the army, within the meaning of this section? Counsel for defendant contends that, in view of the fact that in a statute of later date than the one above quoted, congress had provided that no officer on the active list should hold any civil office, thereby showed its intention not to prohibit those upon the retired list from holding any and all civil offices. But it must be borne in mind that when, at a date long after the original enactment of both of said laws, congress came to revise them, it treated both as in full force, and re-enacted them as a part of the Revised Statutes,—one as a part of section 1860, above quoted, and the other as section 1222,—and the date of such re-enactment was long subsequent to the creation of the retired list of the army. The dates at which these statutes, respectively, were originally enacted, can, therefore, have little or no force, and we must recognize both as part of the law of the land, unless they are so contradictory that they cannot stand together, and this we cannot hold them to be; for one applies the prohibition to all civil offices, and the other to those in territories only. And it would be entirely competent for congress to adopt one rule as to civil officers in territories, and a different one as to such officers elsewhere. Besides, we could not hold the more comprehensive section as to territories to have been repealed by the simple enactment of a more restrictive one, as applicable to the entire body of officers of the army.

The language of section 1860, above quoted, then, must be considered as entirely unaffected by the other section above referred to, and receive the construction which the words used would, in their ordinary signification, indicate; and if the *status* of officers upon the retired list of the army is such that they must properly and fairly be said to belong to the army, then they, as well as officers on the active list, are within the prohibition prescribed by said section. It is clear that said officers have not, by any act of their own, ceased to belong to the army, for many of them are placed upon said retired list against their will, and subject to a strong protest on their part, and it must follow that if they have ceased to belong to the army, it is because congress has so enacted. Has congress done this? Certainly not in express terms, nor do we think it has by implication; for all that congress has done is to provide that they shall be relieved from certain duties, and shall be deprived of a portion of the pay of their rank; and instead of providing that such officers shall not belong to the army, it has, in our opinion, expressly provided that they shall; for section 1094 of the Revised Statutes provides that the army shall consist, among other classes, of the officers on the retired list, and that which is thus made a constituent part of the army can hardly be said not to belong to it. Besides, congress can at any time provide

for the return to active duty of all such officers, and this without any act or consent on their part; and if, as such retired officers, they are not a part of the army, then congress can, without any consent on their part, transfer a particular body of men from private life to the army, and leave all other classes unaffected by said legislation.

Upon a full consideration of all the statutes upon the subject, we think that officers upon the retired list belong to the army. Besides, the supreme court of the United States, in the case of *U. S. v. Tyler*, 105, U. S. 244, seems to have decided substantially this question; for Mr. Justice MILLER, in deciding said cause, and speaking for the entire court, rendered the following opinion:

"There is a manifest difference in the two kinds of retirement, namely, retiring from active service, and retiring wholly and altogether from the service. In the latter case, such reward or compensation as congress thought proper to bestow, namely, one year's pay and allowance in addition to what was previously allowed, is given at once, and the connection is ended. In the former case, compensation is continued at a reduced rate, and the connection is continued, with a retirement from active service only. The question is, therefore, whether an officer thus situated is in the service within the meaning of section 1262. That section allows an increase of pay for every five years' service. When the service ends there can be no increase on that account. As long as the service continues, the increased pay applies whenever it amounts to five years. The law under which these officers are retired does not require their consent, nor does it require that the order for their retirement shall be based upon any absolute incapacity for further service. It may be based upon age, which, being fixed at a minimum of sixty-two years, by no means implies such incapacity. It may be based upon wounds received in battle; but the person retired for this cause may, for many purposes, be a very useful officer.

"The provisions of the statutes, and their uniform treatment of these officers, is conformable to this view, and necessarily implies that, while not required to perform full service, they are a part of the army, and may be assigned to such duty as the laws and regulations permit. Section 1094 of the Revision designates specifically, by a catalogue of twenty-eight items, of what the army of the United States consists, and the twenty-seventh item of this enumeration is 'the officers of the army on the retired list.' They are, then, by law a part of the army. Section 1256 enacts that 'officers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired. They shall continue to be borne on the army register, and shall be subject to the rules and articles of war, and to trial by general court-martial for any breach thereof.' Section 1259 declares that they may be assigned to duty at the Soldiers' Home; and section 1260, that they may be detailed to serve as professors in any college. It is impossible to hold that men who are by statute declared to be a part of the army,—who may wear its uniform, whose name shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace,—are still not in the military service. If congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the army of the United States. * * * We are of opinion that retired officers are in the military service of the government, and that the increased pay of ten per

Centum for each five years' service applies to the years so passed in the service after retirement as well as before."

Much has been said about the hardship of depriving a wounded soldier of an office to which he has been called by the people; but with this we have nothing to do, as it is our duty to adjudicate the law as we find it, and not to encroach upon the legislative branch of our government by enacting laws to meet the exigencies of particular cases.

It follows, from all that has been said, that defendant was and is not eligible to the said office of county treasurer, of which he was and is in possession, and that the judgment of *ouster* rendered against him by the district court must be affirmed; and it is so ordered.

GREENE, C. J., concurs.

SUPREME COURT OF NEVADA.

(19 Nev. 103)

THOMPSON v. RENO SAVINGS BANK and others.

Filed May 20, 1885.

1. CORPORATIONS—CERTIFICATE OF INCORPORATION—SUBSCRIBERS TO STOCK—ESTOPPEL.

The certificate of incorporation of a company is made for the benefit of the public and not of the corporation. Those who participated in the incorporation, and, by a certificate made in pursuance of law, announced the amount of its capital stock, cannot, as against the creditors of the corporation, contradict their own certificate.

2. SAME—STOCKHOLDER AND COMPANY—EFFECT OF SECRET ARRANGEMENT.

Any secret arrangements between the corporation and its stockholders, by which the responsibility of the latter is made less than it appears to be under the articles of incorporation, is void as against creditors.

3. SAME—CERTIFICATE—APPARENT SUBSCRIBER TO STOCK—ESTOPPEL.

A party who permits his name to remain in the certificate of incorporation as that of a subscriber to shares of its stock, cannot afterwards, as against creditors, deny such subscription.

4. SAME—CREDITOR—STOCKHOLDER—SITUATION—COURSE TO BE PURSUED.

A party who is at once a creditor and a subscriber to the stock of a corporation, must, upon the failure of the company, pay up the amount of his unpaid subscription and surrender the collateral securities. He can then participate in the fund ratably with the other creditors.

5. SAME—OBLIGATION OF INDIVIDUAL SUBSCRIBER—LIABILITY TO CREDITOR OF COMPANY—REMEDY.

The obligation of a subscriber to stock of a corporation is several and not joint. He may be sued by a creditor of the corporation for the amount of his unpaid subscription, and, if he holds himself aggrieved thereby, he must seek his remedy as against the other stockholders in default like himself.

6. EQUITY PRACTICE—COMPLAINANT—SUIT BY ONE CREDITOR OR ALL—LAW OF NEVADA.

The rule of equity that one or more creditors may sue for the benefit of all who may elect to come in and stand by the decree, is adopted by the statutes of Nevada, (Comp. Laws, § 1077.)

7. SAME—AMENDMENT TO INCLUDE FELLOW-CREDITORS IN A BILL FILED BY INDIVIDUAL.

Equity allows a creditor who has filed a bill in his own interest to afterwards amend it so as to include other creditors of his class as participants in the relief.

Appeal from a judgment of the Seventh judicial district court, entered in favor of plaintiff, and from an order denying defendants a new trial.

R. M. Clarke and T. Coffin, for appellants.

M. N. Stone and Lindsay & Dickson, for respondents.

BELKNAP, C. J. The Reno Savings Bank is a corporation organized under the laws of this state for banking purposes. It was engaged in the business of banking from its organization, in the month of April, 1876, until the twenty-fourth day of June, 1880, when it became involved and suspended business. It was then indebted to plaintiff Thompson and many others, some of whom, for convenience,

assigned their demands to him. Thompson recovered judgment against the bank. An execution issued upon the judgment was returned *nulla bona*, and thereupon Thompson brought this suit in equity against the bank and Lake, averring, among other things, the recovery of the judgment; that the bank had no assets subject to execution; that Lake was indebted to the bank in the sum of \$17,500 upon his unpaid subscription to its capital stock; and prayed that this amount be applied to the payment of the judgment. The suit was brought in the first place by Thompson for himself alone. At the commencement of the trial the complaint was amended so that all other creditors who would contribute to the expense of the suit could come in as parties and seek relief with the plaintiff. A decree was rendered in favor of plaintiff. From the decree, and an order overruling a motion for a new trial, this appeal is taken.

The certificate of incorporation of the bank fixes its capital stock at \$100,000, divided into 100 shares, of the par value of \$1,000 each. The bank commenced business with the sum of \$30,000, of which defendant Lake paid \$7,500. Lake claims that he is not liable, because this sum was not paid as a subscription to capital stock, but as a capital upon which the bank was to carry on its business, and avers that it was agreed among those who paid the money that it should be in full of all liability as to them.

The capital stock of a corporation, other than a mining corporation, is the amount of money paid or promised to be paid for the purposes of the corporation. It is a fixed sum, not to be increased or diminished except in the mode permitted by statute. This sum the law requires shall be stated in the certificate of incorporation, to be filed with the county clerk of the county in which the principal place of business of the corporation is situated, and a copy in the office of the secretary of state. The purpose of this requirement is obvious.

The shareholders are not, under the constitution, liable for the debts of the corporation. The capital stock, and especially the unpaid subscriptions thereto, is a trust fund for the benefit of the general creditors. Where, therefore, the law requires a public declaration of the amount of the capital upon which a corporation operates, it contemplates a truthful statement in which the general public dealing with the corporation may confide. The certificate is made for the benefit of the public, not for the corporation or its stockholders. Those who participated in the incorporation of this bank, and, by a certificate made in pursuance of the statute, announced the amount of its capital stock, cannot, as against the creditors of the corporation, contradict their own certificate. Defendant Lake signed it, was president and one of the directors of the bank, participated in the management of its affairs during the period it was engaged in business, and received dividends upon his investment. He cannot now be heard to deny the truth of the certificate which he helped make, and to assert that the capital of the corporation was \$30,000, instead

of \$100,000. Not only will equity refuse to hear the defense interposed, but the arrangement alleged to have been made is in defiance of the statute under which the bank was incorporated.

Section 3543 of the Compiled Laws provides:

"It shall not be lawful for the directors to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock, nor to reduce the amount of the same."

Other provisions of the laws upon the subject of corporations permit an increase or diminution of capital stock. Whether the provision concerning a reduction applies to corporations of the character of defendant it is unnecessary to inquire, since it is not pretended in this case that any reduction was made in compliance with law. The statute requires that any change in the amount of capital stock shall be made at a stockholders' meeting called for that purpose, upon notice specifying the object of the meeting and the proposed changes, which notice shall be published for eight weeks in a newspaper of the county in which the principal place of business of the corporation is located. Comp. Laws, §§ 3401, 3406-3408, 3544.

The publicity required in this proceeding is for the purpose—in part, at least—of advising the public dealing with the corporation of the proposed change. The requirement of the statute—*First*, that the publicly recorded certificate of incorporation shall state the amount of the capital stock; and, *second*, that any change in the amount thereof shall only be made after extended public notice—is in direct conflict with the secret contrivance alleged to have been made by Lake and his associates.

The decisions uniformly hold that any secret arrangement between the corporation and its stockholders, by which the responsibility of the latter is made less than it appears to be under the articles of incorporation, is void as against creditors. Thus, in *Allibone v. Hager*, 46 Pa. St. 48, the registered certificate of incorporation showed that a given amount of stock remained unpaid. The defendants, who had prepared the certificate, claimed that the unpaid balance represented stock subscribed for by them as agents of the corporation, to be sold by it when in need of funds. The court overruled the defense, in this language:

"But, if I comprehend the ground of defense, it seems to me to be directly in conflict with the act, and in contradiction of the certificate. The act requires the stock to be subscribed for, and by persons who are to become members of the company, and the certificate shows that all the original stock was subscribed by and for the defendants in this suit. Whatever might be the law between them and the corporation, as between them and the public the certificate is conclusive. I cannot agree, therefore, with the position that creditors have only the rights and equities of the corporation as against the stockholders. They have the rights which the statute gives; no more and no less. The certificate discloses the extent of the capital stock, and the statute renders all the subscribers to it liable for its payment when creditors call. Were undisclosed arrangements permitted to defeat or control the effect of the certificate, that safeguard would at once become a snare instead of a pro-

tection. If capital seeks for immunities, it must take them with such liabilities as are the terms upon which they are granted."

In *McHose v. Wheeler*, 45 Pa. St. 40, the certificate was acknowledged and recorded, certifying that \$100,000 was subscribed as the capital stock of a corporation, and that one-quarter of this amount had been paid in. The certificate was untrue. Many of the persons named as subscribers had not subscribed, and no money was paid in. The court held that if a person named in the certificate as a member acted as such, or did not promptly disavow his alleged membership, upon discovering the use of his name, by showing that he was not a member, he would be deemed as ratifying the relation as to creditors; that the defendants, who were incorporators, could not set up their own faults and mistakes in their organization as a defense against creditors; and that, therefore, it was immaterial that no part of the stock had been paid in, although the statute under which the corporation was created required one-quarter of the amount to be paid.

Appellant, with others, assumed control of the bank. He must be held to the consequences of this connection. Persons dealing with the bank were assured that its capital was \$100,000. The law contemplates that this representation shall be true. Appellant entered into an arrangement by which he appeared to comply with the articles of incorporation. He must perform the obligation which he appeared to assume. If he did not expressly subscribe for stock, the law implies an agreement upon his part to pay his proportionate share. He received one-quarter of the profits of the concern when it was apparently prosperous, and is justly decreed to be a subscriber to its stock to the same extent. Having received the advantages of stockholdership, he cannot escape its responsibilities.

Appellant is a creditor of the bank in a larger sum than the amount of his unpaid subscription, and claims the right to set off his liability with the bank's indebtedness. In *Scammon v. Kimball*, 92 U. S. 366, it was held, upon similar facts, that set-off could not be allowed. In deciding the case, the court said:

"Such an indebtedness [for unpaid shares] constitutes an exception to the rule, that, when there are mutual debts, 'one may be set against the other,' as originally provided by act of parliament; or, perhaps, it would be more accurate to say that the rule does not apply when it appears that the debts are not in the same right, as well as mutual. *U. S. v. Eckford*, 6 Wall. 488. Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt; nor will such courts allow a set-off of debts accruing in different rights, except under very special circumstances, and when the proofs are clear and the equity is very strong. 2 Story, Eq. § 1437."

The debt which the appellant owes for his unpaid stock is a trust fund which equity will distribute among all of the creditors. The proofs show a deficiency in the fund. Each must, therefore, take his dividend *pro rata*. If the set-off were allowed, the appellant would appropriate the entire fund. "If such a defense were entertained,"

said the supreme court of Pennsylvania in *Macungie Sav. Bank v. Bastian*, 12 Chi. Leg. N. 409, "the effect would be to withdraw from depositors and other creditors of the insolvent bank a portion of the very fund which was specially provided for the common benefit of all alike, and apply it to the sole benefit of the defendant, who, at best, has no better right thereto than other depositors. If every delinquent subscriber to the capital stock could thus pay his subscription, what would become of other depositors and creditors of the insolvent bank? It is not difficult to see what a perversion it would be of the trust fund, and to what gross injustice it would necessarily lead."

The bank's indebtedness to appellant is collaterally secured. The district court correctly held that appellant must pay the amount of his unpaid subscription and surrender the collateral securities. He could then participate in the fund ratably with the other creditors.

Objection is made for want of proper parties to maintain this suit. It is urged that the other stockholders should be made parties defendant, to the end that each shall contribute his proportion to the debt, and also that all of the creditors should be united as plaintiffs, so that each may receive his proportion of the fund, and the matter be finally determined in one suit. In a proceeding to wind up and finally settle all of the affairs of the bank, all of the stockholders would be necessary parties defendant. This is not such a proceeding, but one to subject the equitable assets of the bank to the claim of the creditors. If, in this proceeding, the defendant is required to pay more than his proportionate share of the debts of the bank, he may in an action against the remaining stockholders, require them to contribute their fair share. In *Hatch v. Dana*, 101 U. S. 210, this question was considered. The court said:

"The liability of a subscriber for the capital stock of a company is several and not joint. By his subscription each becomes a several debtor to the company; as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. A creditors' bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of this corporation, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property,—that is, out of its unpaid stock,—there is not the same reason for requiring all the stockholders to be made defendants. In such a case no stockholder can be required to pay more than he owes."

In *Marsh v. Burroughs*, 1 Woods, 468, the non-joinder of parties was set up in defense. The court said:

"A judgment creditor, who has exhausted his legal remedy, may pursue in a court of equity any equitable interest, trust, or demand of his debtor, in

whosoever hands it may be; and if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate shares of the liability, he might never get his money." *Ogilvie v. Knox. Ins. Co.* 22 How. 380; *Bartlett v. Drew*, 57 N. Y. 587.

The authorities are somewhat conflicting upon the question as to necessary parties plaintiff, in suits of this character. In *Marsh v. Burroughs*, Mr. Justice BRADLEY said:

"It has long been settled that a judgment creditor, who has exhausted his legal remedy by execution returned *nulla bona*, may alone, or with other judgment creditors, file a lien against persons holding property of the debtor, which, on account of fraud or the existence of a trust, cannot be reached by execution."

To the same effect is *Bartlett v. Drew*, 57 N. Y. 587. This ruling goes further than is necessary to uphold the present case. Other cases hold that all persons interested in the subject-matter of the suit must be made parties, so that complete justice may be done, and a multiplicity of suits avoided. An exception to this rule has been uniformly allowed in cases of the character of the present one, when there are many persons having a common interest. In such cases one or more may sue for the benefit of all, and those who come in and establish their claims share with the plaintiff in the benefit of the decree. The doctrine is thus stated by Chancellor WALWORTH in *Hallett v. Hallett*, 2 Paige, Ch. 19:

"If there are many parties standing in the same situation as to their rights or claims upon a particular fund, and when the shares of a part cannot be determined until the rights of all the others are settled or ascertained, as in the case of creditors of an insolvent estate, or residuary legatees, all the parties interested in the fund must, in general, be brought before the court, so that there may be but one account, and one decree settling the rights of all. And if it appears on the face of the complainant's bill that an account of the whole fund must be taken, and that there are other parties interested in the distribution thereof, to whom the defendants would be bound to render a similar account, the latter may object that all who have a common interest with the complainants are not before the court. In these cases, to remedy the practical inconvenience of making a great number of parties to the suit, and compelling those to litigate who might otherwise make no claim upon the defendants, or the fund in their hands, a method has been devised of permitting the complainants to prosecute in behalf of themselves, and all others standing in the same situation who may afterwards elect to come in and claim as parties to the suit, and bear their proportion of the expenses of the litigation."

This rule of equity practice was adopted in this state by section 1077 of the Compiled Laws. The provision enacts, among other things, that "when the question is one of common or general interest, of many persons, * * * one or more may sue or defend for the benefit of all." See, also, *McKenzie v. L'Amoureux*, 11 Barb. 516.

The amendment to the complaint heretofore mentioned, by which the other creditors could come in and prosecute the suit with the plaintiff, brought the case within the exception stated. The amend-

ment was made immediately before the trial, but the court, by its decree, allowed the remaining creditors a reasonable time—30 days from the entry of the decree—within which to prove their claims and share with the plaintiff in the distribution of the trust fund. None came in; but no complaint in this regard has been suggested in behalf of any creditor.

The action of the district court in this particular is consonant with the equity practice. "The court will generally, at the hearing, allow a bill, which has originally been filed by one individual of a numerous class in his own right, to be amended, so as to make such individual sue on behalf of himself and the rest of the class." 1 Daniell, Ch. Pl. & Pr. 245. Nor does it appear that notice to the other creditors was necessary. Thompson, in his Treatise upon the Liability of Stockholders, says of suits brought by one creditor in behalf of himself, and all others who may come in and establish their debts:

"This does not mean that the creditor who files the bill is under any obligation to look up all the widely-scattered creditors of the corporation, and get their consent to the filing of the bill, or notify them to join him in it." Section 351.

The decree and order of the district court are affirmed.

During the pendency of this appeal, Mr. Lake, defendant herein, has died. An order has been made directing the substitution of the administrator of his estate.

(18 Nev. 361)

LAKE v. BENDER, Adm'r, etc.¹

Filed May 25, 1885.

DIVORCE—ALIMONY—ACTS OF 1861 AND 1873.

Sections 25 and 27 of the divorce law (act 1861) is to be construed now consistently with the act defining the rights of husbands and wives, (act 1873,) and not according to the common law, as before the passage of the latter act.

Appeal from a judgment of the Seventh judicial district court, Washoe county, entered in favor of defendant, and from an order denying plaintiff's motion for a new trial as to the property rights.

C. T. Varian and Lindsay & Dickson, for appellant.

Wm. Webster and J. F. Alexander, for respondent.

LEONARD, J. A rehearing was granted in this case upon that portion of the decree directing the payment of \$150, monthly, to plaintiff during her life-time, or so long as she should remain unmarried, and making the same a charge and lien upon certain real estate, the separate property of the deceased, M. C. Lake; and in the order we invited argument touching the correctness of the decision in *Wuest v. Wuest*, 17 Nev. 221. In that case we held that, under the statute and upon the facts, the court did not err in awarding all the property of the husband, of about the value of \$1,500, to the wife for her support. There was nothing in the record showing the value of the use of the property, or that its use would support her. The utmost extent of the decision was to the effect that, in an action of divorce for

¹For original decision and report of this case, see 4 PAC. REP. 711.

extreme cruelty, the court may award all of the guilty husband's property to the wife, if it is necessary for her support. That decision does not conflict with our conclusions in this case, and it is therefore unnecessary to consider it further.

It is the law of this case that all the property described in the complaint was the separate estate of Lake. It came mainly from property owned by him before marriage, although it was increased by the labor and skill of both spouses. In law the property was acquired through him, and in disposing of it he was entitled to a decree appropriate to cases where an innocent wife obtains a divorce on account of the cruelty of her husband, where there is no community property, but a large amount of separate property belonging to him. The facts that both plaintiff and Lake labored hard, and that the result of their labor was an increase of the latter's separate property, would not have justified the trial court in making a disposition of the property different from what might have been made if there had been no increase on account of the labor of one or both, save that, in providing for her support, the facts mentioned, with others, were proper subjects for consideration.

It is not claimed that, under the statute, the court was *obliged* to award to plaintiff a portion of the property in question, or a sum in gross; but it is urged that the property could have been divided, that it ought to have been, and that, in making the order for a monthly payment of \$150, the court abused its discretion. A close examination of our statutes, touching the division of property in divorce cases, enables us to realize the truth of Mr. Bishop's remark, when he says:

"The popular ignorance, even in the legal profession, of the law of marriage and divorce, has, in times not long past, been so dense as almost to exclude from the legislation on this subject its proper forms. Largely the statutes contain expressions and provisions of whose meanings, and especially of whose consequential effects, their makers pretty certainly had no clear idea whatever. Instead of consistency and verbal propriety, they abound in absurdities. They are often chaos." 1 Bish. Mar. & Div. § 89.

Still it is our duty to interpret these laws as we find them, according to well-established rules. In the present case there are two rules of great importance, viz.: All the statutes upon the subject in hand must be construed together as parts of one whole; and when there are general and specific provisions in a statute which are apparently conflicting, the latter, as a rule, qualify and limit the former. Says Mr. Bishop, in his valuable work on Written Laws, at section 64:

"Where there are words expressive of a general intention, and then of a particular intention incompatible with it, the particular must be taken as an exception to the general, and so all parts of the act will stand. And, as a broad proposition, general words in one clause may be restrained by the particular words in a subsequent clause of the same statute. This doctrine applies even to statutes enacted at different dates." And see *Id.* §§ 112a, 112b, 156.

We do not deem it necessary to consider what would have been a proper construction of sections 25 and 27 of the statute of 1861, in relation to marriage and divorce, prior to the statutes of 1865 and 1873, defining the rights of husbands and wives, and prior to the amendment of section 27 in 1865. See St. 1861, p. 98; St. 1864-65, p. 239; Comp. Laws, § 151 *et seq.*, and section 220.

It is true that when the statute of 1861 was passed the common law in relation to husbands and wives was in force; and counsel for appellant insist that sections 25 and 27 should now receive the same construction that should have been placed upon them prior to the passage of the statutes defining the rights of husbands and wives. Our opinion is that they must be construed according to our present condition, and, as much as possible, in harmony with all laws affecting the subject under consideration.

It is just as much the duty of courts granting divorces now, to "make such disposition of the property of the parties as shall appear just and equitable," as provided by section 25, keeping in view the limitations placed upon that section by section 27, and by section 12 of the act defining the rights of husbands and wives, as it was before the community system was adopted; but in making such disposition, consideration must be given to our altered condition. For instance, section 12 of the statute of 1873, defining the rights of husbands and wives, provides that—

"In case of dissolution of the marriage by decree of any court of competent jurisdiction, the community property must be equally divided between the parties, and the court granting the decree must make such order for the division of the community property, or the sale and equal disposition of the proceeds thereof, as the nature of the case may require: provided, that when the decree of divorce is rendered on the ground of adultery, or extreme cruelty, the party found guilty thereof is entitled to such portion of the community property as the court granting the decree may, in its discretion, from the facts of the case, deem just and allow; and such allowance shall be subject to revision on appeal, in all respects, including the exercise of discretion, by the court below."

It is evident that the section just quoted controls the disposition of the community property, although section 25 has not been amended or repealed in terms. And if it is necessary to do so, in order to make a just and equitable disposition of the property of the parties, it is equally incumbent upon courts to consider the fact that now all property of husbands and wives is held in common, or belongs solely to one or the other. The property in question having been the separate property of Lake, section 12, above quoted, was inapplicable, and the power and duty of the court below depended upon sections 25 and 27. Comp. Laws, 218, 220. Sections 25 and 27 are as follows:

"Sec. 25. In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they

will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children.

* * *

"Sec. 27. When the marriage shall be dissolved by the husband being sentenced to imprisonment, and when a divorce shall be ordered for the cause of adultery committed by the husband, the wife shall be entitled to the same proportion of his lands and property as if he was dead; but, in other cases, the court may set apart such portion for her support, and the support of their children, as shall be deemed just and equitable. * * *

This section is as amended in 1865, when it was changed so as to read, "but in other cases the court *may* set apart," etc.; thus giving the court wider discretion than it possessed under the original section.

It may be admitted for the purposes of this case, as claimed by counsel for appellant, that, under section 25 alone, it might be held that the legislature intended its application to all property rights existing in either spouse at the time of granting the divorce; but section 25 is limited by section 27, and the result is that, in cases like the one under consideration, the former, which expresses the general intention of the legislature must give way to the latter, which expresses the legislative intent in specified cases. See Bish. Written Laws, above cited. It was the court's duty to make a just and equitable disposition of the property, but in so doing it had to be governed by section 27, because it was just such a case as that section made special provision for. It would hardly be claimed that, when the marriage is dissolved by the husband being sentenced to imprisonment, or for his adultery, the court could award the wife either more or less of his property than she would be entitled to receive if he were dead. Then why can it be said that, "in other cases," the court may do more than the statute says may be done? When the statute declares that, in case of a divorce for extreme cruelty, the court "may set apart such portion of his property for her support and the support of their children as shall be deemed just and equitable," what authority exists for awarding more? It will be noticed that the word "support" is used in the same sense in relation to the wife and their children. Certainly the legislature did not intend to set apart or award his property to the wife for their children, or to the children direct, except such as might be proper and requisite for their support, including education, during their minority. Indeed, beyond that there was no legislative power. *Fitch v. Cornell*, 1 Sawy. 170. In our opinion the intention to limit the disposition of his property to her proper support in cases like the present, is equally manifest. If the statute provided only that the court might set apart so much of the husband's property as might be necessary and proper for the education of their children, it could not be held that any sum beyond what might be needful for the purpose mentioned could be taken from him. It was the court's duty, then, to set apart such portion of the property in question for appellant's support as, under the circumstances, was just and equitable. If it did so, its discretion was not abused, and this

court has no right to disturb the order. If it did not, our duty is to see to it that the law is carried out in letter and spirit. "Support" is a word of broad signification; it includes everything—necessities and luxuries—which a person in appellant's position is entitled to have and enjoy. Upon receiving a divorce on account of Lake's misconduct, she is entitled to a support from his property during her life, or so long as she shall remain unmarried. *O'Hagan v. Executor of O'Hagan*, 4 Clarke, (Iowa,) 516; Comp. Laws, § 220.

An order directing the payment of a specified sum monthly, and making it a charge and lien upon real estate of Lake, is tantamount to setting apart so much of his property. That amount is appropriated to her use for her support. Conceding that specific property might be set off and awarded to her in fee, if such an order was necessary for her support, it does not follow that it must or ought to be done in this case. At any rate, admitting that the husband may be divested of his title in a proper case, there is nothing before us to show that appellant's support is less secure according to the method adopted by the court than it would have been if the aggregate amount and value of her allowance had been set apart to her in specific property. No complaint is made because the property securing the allowance is insufficient.

In proper cases the statute of Illinois permits the court to decree a sum in gross for alimony, or a part of the husband's real estate in fee to the wife. Yet, in several cases where such was the method adopted, the decree was reversed. In *Ross v. Ross*, 78 Ill. 404, the court said:

"The mode of allowance of alimony in vesting the fee of real estate in the wife is objectionable. While such practice has, in some instances, been sanctioned by this court, it has been under special circumstances. In *Von Glahn v. Von Glahn*, 46 Ill. 136, and *Keating v. Keating*, 48 Ill. 241, such practice was disapproved of, and it was said that, unless there are special reasons to the contrary, an annual allowance, to be held under the control of the court, is the better mode of decreeing alimony. In the latter case, the decree of the lower court, giving the complainant the fee of certain real estate, instead of a life-estate or an annuity secured upon the property, was reversed, the court remarking: 'If the property was not bought with her [complainant's] money, there was nothing in the case calling for a divestiture of the fee.'"

There are many cases where the decree has been reversed because the allowance was too great or too small, but we have been unable to find one where it was reversed because a proper monthly or yearly allowance was given, instead of a sum in gross or a part of the husband's estate in fee.

There is another reason why the method adopted in this case is the better one. Appellant may live many years or few. The court has no method of ascertaining the number with any reasonable accuracy, and consequently it is impossible to know what amount or value of property she is justly and equitably entitled to receive for her support. See, also, *Robbins v. Robbins*, 101 Ill. 421; *Dinet v. Eigenmann*, 80 Ill. 274; and *Russell v. Russell*, 4 Greene, (Iowa,) 28.

It remains to consider whether, from all the facts, the court properly exercised its discretion in fixing the amount that appellant ought to receive for her support. Appellant and Lake were married in September, 1864. She was a widow, with three children, at the time, and about 26 years of age. She is now about 47. She had no property, but for more than 15 years she worked hard and performed faithfully the duties of a wife. When she married Lake she was strong and healthy, but at the time of the trial she testified that the hard work she had done had prematurely enfeebled and aged her. She has one child by Lake, a son aged about 10 years.

The record shows, and the court found, that Lake was worth over \$200,000, and that his net income was \$7,232 a year. In law this property was Lake's, but during the 15 years of their married life she contributed her services and co-operated with him in the manifold enterprises undertaken by him. Early and late she toiled for him, year in and year out. At the time, or a little before the complaint was filed, Lake purchased a two-story hard-finished dwelling-house in Reno, known as the Marsh residence, for a home for appellant and himself, at an expense of \$6,000. In his answer he averred that he was ready and willing to provide appellant and their son Charles with that home, and continue to provide them with all the necessities and comforts of life. During the pendency of the suit he lived at the Lake House, and in his answer offered the Marsh residence, with servants and necessities and supplies, to appellant during the pendency of the suit. In addition to the Marsh residence, Lake owned the Lake ranch, of the value of \$40,000, whereon there was a valuable residence, a two-story frame house, well furnished with carpets, pictures, black-walnut sets, etc. Appellant, with Lake, lived on the ranch from 1871 to 1879. She superintended the building of the ranch house during Lake's absence in the east.

Lake testified that Mrs. Lake did a good deal of work,—waited upon the table, did chamber-work,—but that for a year and a half before the suit she had a phaeton and horse at her disposal, and a man to hitch it up, and went whenever she pleased. Appellant is not devoted to society, and her habits are economical. The testimony establishing the fact of Lake's extreme cruelty to appellant is not before us, and we are unable, therefore, to state specifically the acts committed. That they were sufficient, however, to justify the court in granting a divorce, is not disputed. Appellant is the injured party, and she has a strong claim upon the court. She is entitled, at least, to be as well supported during the remainder of her life as she ought to have been, and was, prior to her application for divorce. She had a good house, well furnished, then, and is entitled to it now. She had, and ought to have had, servants, a horse and carriage, the necessities and many of the luxuries of life. Lake was able to furnish these things, and after her long and laborious married life she ought to have enjoyed, and, but for his misconduct, would have en-

joyed, the comforts of home and affluence. That she can exist upon the allowance made, or even less, we are well aware; but we are now convinced that she is entitled to receive, and ought to have, more. When the divorce was granted she had nothing. Her home was taken from her, and for another she could look only to the generosity of the law. It is impossible to lay down a rule that should govern courts in cases like this, except that they should consider all the circumstances surrounding the parties, including, besides those mentioned in the statute, the financial condition of the husband and the requirements of the wife; and, to the extent of her support, she should not be left to suffer pecuniarily for having been compelled, by his ill conduct, to seek a divorce. Counsel for appellant say, and quote 2 Bish. Mar. & Div. § 482, as authority, that she is entitled to be placed in as good situation as to property as if death, instead of divorce, had broken the marriage bond. Mr. Bishop does say:

"If, in this divorce decreed in favor of the wife, the statutes of the state will permit,—and if they have not, and as far as they have not, given her, who, on the death of the man, will not be his widow, substantially the rights of a widow in his property,—the court should increase the annual sum which, on the score of maintenance, it deems she should receive, by what will place her as to property in as good situation as if death, instead of divorce, had broken the marriage bond."

We have great respect for Mr. Bishop, but must be governed by the statute, as he would be if sitting in our place. Under our statute, upon dissolution of marriage, common property is divided equally between the parties except when the divorce is granted for adultery or extreme cruelty, when the party found guilty shall receive such portion as the court may, in its discretion, deem just and allow. This is upon the theory that the common property is acquired by the joint efforts of the parties, and should be equally divided between them, unless one of them has forfeited the right by committing an act of adultery or extreme cruelty, in which case the court may divide the property according to its legal discretion. Comp. Laws, 162.

When the divorce is granted on account of the adultery of the husband, and when marriage is dissolved by the husband being sentenced to imprisonment, as before stated, the wife shall receive the same proportion of his real and personal property as if he were dead; *but in other cases* the court may set apart such portion *for her support and the support of their children* as shall be just and equitable. Comp. Laws, 220.

It is too plain for argument that the legislature intended to take all discretion from the court in the two cases first mentioned, and "in other cases" to limit the exercise of its discretion to the setting apart of such portion of his property as might be deemed just and equitable *for her support and the support of their children*. Our conclusion is that the monthly sum of \$25.00 was and is a just and equitable amount to be set apart from Lake's property for the support of

appellant, in addition to the amount awarded for the support of the infant son, Charles.

The cause is remanded, with instructions to the court below to modify the decree herein by inserting said sum of \$250 as the sum to which appellant was and is entitled to be paid, and shall be paid, monthly, from the date of the decree, by M. C. Lake, or his personal representative; and by making said sum a charge and lien upon other real property, in addition to that described in the decree, if it shall appear to the court that the property already charged was insufficient to secure full and prompt payment, monthly, of said sum of \$250; and the decree so modified is affirmed.

v.7p,no.2—6

SUPREME COURT OF IDAHO.

(2 Idaho [Hasb.] 122)

SYNNOTT and others v. SHAUGHNESSY.

Filed March 2, 1885.

PRINCIPAL AND AGENT—SALE OF MINE—AGENT AS PURCHASER.

If A. and B. own a mine, and authorize C. to sell it for them or bring them a purchaser at a fixed price, with the understanding that C. is to have all he can get above that price, C. may make the best bargain he can with any one; he may purchase it himself, and is under no obligation to disclose to A. and B. anything that he may have discovered concerning the mine after such arrangement is made. BUCK, J., dissenting.

Angell & Sullivan and Sutherland & McBride, for appellants.

Rosborough & Merritt and Prickett & Lamb, for respondents.

MORGAN, C. J. The cause was tried before the court at the June term, 1883, of the district court for Alturas county. Judgment was for the defendant and the complaint dismissed. Plaintiffs moved for a new trial, and the motion was denied. Plaintiffs appeal both from the judgment and from the order denying a new trial.

The case shows that on the fifth day of July, 1881, the plaintiffs were the owners and in the possession of the Eureka mine, situated in Mineral Hill mining district, in Alturas county, in the territory of Idaho. On the said fifth day of July, 1881, the said defendant, by his agent, E. A. Wall, purchased the said mine from the plaintiffs John Synnott and Peter Welch for the sum of \$2,200; that on the same day plaintiffs executed and delivered to the defendant a good and sufficient deed of conveyance. On the twenty-fourth day of May, 1882, the plaintiffs bring this action and ask the court to declare this deed fraudulent, null, and void, and set it aside and put the plaintiffs again in possession of said property. Plaintiffs aver—

First. That on the third day of July, defendant, by his agents and employes, discovered on said Eureka claim a large and valuable vein or body of ore, from 18 inches to four feet in thickness, extending about seventy feet continuously along said vein, which rendered said claim of great value, to-wit, of the value of one hundred thousand dollars.

Defendant denies.

Second. Plaintiffs aver that defendant, by his agents, fraudulently and falsely concealed the said vein or ore body from the plaintiffs.

Defendant denies.

Third. Plaintiffs aver that defendant, by his agents and servants, falsely and fraudulently represented and stated to these plaintiffs that no other ore, body, or vein of ore existed in said mining claim, except such as were found by and known to these plaintiffs, as shown in their own tunnels as aforesaid, when defendant well knew, etc., that said vein did exist.

Defendant denies.

Fourth. Plaintiffs aver that said false and fraudulent representations were made by defendant's agents and servants to plaintiffs, to induce them to sell said mining claim at far below its real value, to-wit, for the sum of two thousand two hundred dollars; and that said false and fraudulent representations, so made by the agents and servants of defendant, did induce plaintiffs to be-

lieve that no such ore body existed, and that said mining claim was not worth more than \$2,200, and that said plaintiffs were thus induced to sell and convey said claim for said last-mentioned sum, when, in fact, said claim was then worth one hundred thousand dollars.

Defendant denies.

Fifth. That immediately prior to the discovery of said ore vein or ore body the said plaintiffs had employed one Harry Porter as agent to find them a purchaser for said mining claim, at the price of two thousand five hundred dollars, and that, relying upon the honesty of said agent, they agreed to give said Porter ten per cent. of said purchase price as a compensation.

Defendant denies.

Sixth. That while so employed the said Porter first made the discovery of said vein and ore body aforesaid, which was unknown to plaintiffs.

Defendant denies.

Seventh. That said Porter concealed the same from plaintiffs, and surreptitiously, fraudulently, and collusively, and for the consideration of one thousand dollars, informed the said defendant of the existence of said large vein or ore body, and undertook and agreed to conceal the same from plaintiffs, and to assist said defendant in the purchase of said Eureka claim at two thousand dollars, or a price greatly below its real value; that by such fraudulent acts of said Porter, as well as the misrepresentations and concealments, they were induced, etc.

Defendant denies.

These are all the material issues raised by the pleadings. Upon substantial affirmative proof of all the material averments of fraud on the part of either Wall, the agent of defendant, or on the part of Porter, alleged to be their own agent, plaintiffs claim the right to recover. If they have failed in both, the case fails. The principal errors assigned are (1) that the court has failed to find on all the material issues; (2) that the findings are not supported by the evidence; (3) that the findings do not support the judgment.

The first two propositions are so interwoven and intimately connected that they will be discussed together. The first material issue is, did the defendant, by his agents and servants, on or about the third day of July, 1881, or before the sale, find a large and valuable vein or body of ore, from 18 inches to 4 feet in thickness, extending about 70 feet continuously along said vein, which rendered the mine of great value? In reply to this, the court, in its finding of fact No. 12, say:

"The evidence does not show or tend to show that Wall or Porter, or any other person, had discovered or knew of the existence of any vein or lode of ore in place on the Eureka mining claim, other than such as had been found by and was known to Synnott and Welch (the vendors) in their excavations at any time prior to the sale and execution of the deed."

Objection is made to the use of the words, "the evidence does not show or tend to show." The fact that they had discovered the vein or lode of ore in question before the sale must be proven by the evidence. If the evidence does not show it, nor tend to show it, then, so far as the purposes of the trial go, they had not discovered it, nor did they know of its existence. No one would fail to understand fully the meaning of the court, which was that neither Wall nor Porter,

nor any other person, knew of the existence of the vein or body of ore described. We think the finding substantially met the issue presented. The statement of a fact in language such that men of ordinary knowledge, as well as those learned in law, would understand from it that the fact did or did not exist, would seem to be sufficient. The statement is such that it leads us to the inevitable conclusion that the fact alleged did not exist. See *People v. Hagar*, 52 Cal. 189; *Coveny v. Hale*, 49 Cal. 552; *Emmal v. Webb*, 36 Cal. 204. The fact itself, however, is positively stated in the last half of the fifteenth finding, which is as follows:

"Neither the defendant nor any agent of his had ever discovered or knew of the existence of any vein or lode in said claim (except such as Synnot and Welch had exposed by their tunnels) prior to the sale, nor until some days had elapsed after the sale."

This is a statement of fact, pure and simple, and completely meets the issue tendered. Objection is made to the use of the terms "vein or lode of ore in place" and "vein or lode." The words "vein," "lode," and "ledge" are used as synonymous terms, in the common parlance of miners, in the laws of congress, and in the decisions of courts in mining states and territories. Section 2320, U. S. Rev. Laws, uses the terms as follows: "Veins or lodes of quartz, or other rock, in place, bearing gold, silver," etc. Section 2322: "Locations made on any vein, lode, or ledge situated on the public domain," etc. Section 2323: "Where a tunnel is run for the development of a vein or lode."

Mr. Justice MILLER, of the United States circuit court for the district of Colorado, and Justice HALLETT, sitting with him, in the case of *Stevens v. Williams*, 1 Morr. Min. Rep. 566, 573, clearly define what a vein, lode, or ledge is, as follows:

"In general, it may be said a lode or vein is a body of mineral, or mineral body of rock, within defined boundaries in the general mass of the mountains; nor does the fact that it is occasionally found in the general course of this vein or shoot, in pockets deeper down into the earth, or higher up, affect its character as a vein, lode, or ledge."

This is a perfect definition of the terms "vein," "lode," and "ledge," as understood in mining countries, and also demonstrates the fact that the terms are synonymous. That the terms "vein" or "ore body," as used in the complaint, mean, and were intended by the pleader to mean, the same as if the words "vein or lode of ore," in place of the words "vein or lode," had been used, is abundantly indicated by the words which follow in the complaint, namely, that the defendant, etc., by his agents and employes, had, on third day of July, 1881, discovered on said Eureka mining claim, remote from where these plaintiffs had been at work, a large and valuable vein or body of ore, from 18 inches to 4 feet in thickness, extending for about 70 feet continuously along said vein.

The context clearly indicates that the pleader intended to allege that defendant had so discovered a vein or lode of ore in place, and did not mean by that pieces of float ore, however large or small they may have been, which had broken loose and become detached from the mother lode, and floated down the hill, which is commonly, indeed, universally, called "float" in the mining regions.

The meaning of the terms as used is further indicated by the allegation which follows, to-wit, the existence of which rendered said mine of great value, to-wit, of the sum of \$100,000 and upwards, of the existence of which said vein or body of ore these plaintiffs were wholly ignorant. The pleader well knew that the discovery of float ore did not render the mine of such great value. The experience of men in mining regions teaches them that the discovery of "float" may lead to the ultimate discovery of a vein or lode of ore in place, which would render the mine valuable. They have also learned by sore experience, and after the expenditure of large sums of money, that it frequently leads to the discovery of nothing of any value.

Further evidence that the pleader considered the words "vein or body of ore" synonymous, and, as used, were intended to mean the same thing, is found in the second clause of the complaint, where the terms are used interchangeably, as they allege that defendant represented that no other ore body or vein of ore existed, and further on in same clause that no such body or vein of ore existed. Further on the pleader again returns to "vein or body of ore," clearly showing that the pleader himself considered the terms synonymous. These findings of fact are, we think, entirely responsive to the issue, and completely negative the allegation. Are these findings supported by the evidence?

Porter testifies that on Sunday before the fourth day of July, 1881, he was on the Eureka claim, and was going up the hill on the trail, and picked up a small piece of float, about half as big as a hen's egg, and found three or four more very small pieces. "I made no further search until the fifth of July, (which was the day of the sale to Wall.) I went up with John Gilman. Did not then find any solid vein where it came from. I followed it up, (that is, the float,) and found one piece for Col. Wall about six inches through and eight inches long, about fifty feet from the trail. I did not think it made the claim more valuable to any large extent. If I had, I should have bought it myself, as I was in condition so I could have bought it. That was all the workings, and what was found outside, altogether. There was no concealment of this float at all; it laid right there. I showed that float to John Gilman the same afternoon. I was trying to get him to buy it. This was all the ore found by Wall or Porter, outside the tunnels of the owners, prior to the sale. He says that piece, 6x8, was the largest piece that was found. It was in open ground, nearly bare, and was in plain sight. These two places where I found this float were about 175 feet from the cabin of Synnott and Welch. I

think I saw Mr. Welch walking over the same ground where the ore was before the sale."

Col. Wall testifies:

"The only evidence of a vein that I saw at any time previous to the purchase was small fragments of broken ore which may have come from that vein or from any source, nor was there any ore that I saw at any point on the claim that was visible to any person, in place, in the vein or near the vein. In fact, there was no ore discovered in place in the vein at all until after several days' work had been done with a number of men; merely fragments of ore that had been detached from the lode and drifted down the hill. This work was all done after the purchase."

John Gilman swears he saw a few pieces of weather-beaten float; that Porter was with him; picked up a piece and showed him. "There had been no work done there; saw no excavation whatever; saw no vein at all."

This is substantially all the testimony there is as to defendant, his agent, Wall, or Porter, knowing anything about ore being found before the sale. It is evident it falls far short of sustaining the allegations as to discovering a vein or body of ore, and abundantly supports the findings 12 and 15 above quoted.

The second material averment is that defendant, by his agents and servants, fraudulently and falsely concealed the said vein or ore body from the plaintiffs. In response to this issue the court finds:

"No. 15. No concealment of any material fact concerning said mining claim was ever made by the defendant, or by any agent or employe of his. Neither the defendant nor any agent of his had ever discovered or knew of the existence of any vein or lode in said claim (except such as Synnott and Welch had exposed by their tunnels) prior to the sale, nor until some days had elapsed after the sale."

This finding is completely responsive to the issue made by the allegation, and is supported by the evidence as already demonstrated, as it needs no argument to show that the defendant or his agents could not conceal a vein or ore body which they had not discovered, and of the existence of which they had no knowledge.

The third averment is that defendant, by his agents and servants, falsely and fraudulently represented to plaintiffs that no other ore body or vein of ore existed in said mining claim, except, etc., when defendant well knew it did so exist. In response the court say:

"Finding 14. No false or fraudulent representation concerning the Eureka mining claim was ever made to said vendors, or to any one else, by the defendant, or by any agent or employe of his."

This finding being in response to the averment which assumed that defendant had discovered and knew of the existence of the said vein, which assumption not being supported by the evidence, it follows that this finding is so supported.

The first, second, and third averments having been found against the plaintiffs, the fourth averment is no longer an issue; but it is responded to in the seventeenth finding, which states that Synnott and

Welch were not induced to rely upon, and did not rely upon, any representation, opinion, or act of the defendant, or of any agent of defendant, concerning said mining claim, in selling or disposing of the same, or estimating its value or price.

The fifth averment is that, immediately prior to the discovery of said vein or ore body, plaintiffs had employed one Harry Porter as agent to find them a purchaser for \$2,500; that they would give him 10 per cent. of that sum as compensation; that he then discovered the ore body; that he agreed to conceal it for \$1,000 from plaintiffs, and did conceal it from them, but showed it to defendant's agent, Wall, and agreed to assist Wall in purchasing the mine for a price greatly below its real value. The court below having found that no such ore body was ever discovered by Porter, Wall, or any one else, before the sale, and the evidence conclusively showing that such finding was correct, the whole question of discovery, fraudulent concealment, fraudulent representations concerning it, is finally disposed of. It remains to inquire whether Porter's receiving the \$1,000 from Wall, the agent of defendant, in any way affected the validity of the sale.

The character of the arrangement between Porter and the plaintiffs is thus stated by Synnott and Porter in their testimony. Synnott states that he first told Porter that if he would find a purchaser at \$2,500, they would give him 10 per cent. of the sum. Porter said he was trying to sell the Homestake. When he got through with that he would try to find a purchaser for the Eureka. This was about the twenty-fifth of June, 1881. He then comes down to the fifth day of July, 1881, the day on which the sale was made, and narrates the sale and conveyance, as follows:

"Wall (agent of defendant) came to us on the fifth day of July and offered us \$2,000 for the mine. After some consideration we agreed to take it, and it was arranged we should go to Bullion after supper and make the deed. Then Gilman came to us and offered us \$1,800 and one-tenth of the mine, or \$2,200 cash. Gilman then told us Porter had made a big find on the Eureka. I said, 'Where?' Gilman said, 'You walk over it;' pointing up the trail. I said I knew better; I did not believe it. In the evening, after supper, we went down to Wall's office. Porter told Wall that Gilman had again been to see them, and offered them \$200 more, and they said they could not afford to lose it. Wall then agreed to give us \$2,200. We took it and made the deed."

Synnott then returns to the arrangement with Porter, and says:

"It may have been in June we had tried to sell it. The least we ever offered to sell the mine for was \$2,000. Whether that was in May or June I don't know."

"*Question.* When and how long was Porter in your employ *Answer.* As I have stated, it was about the twenty-fifth of June; it may have been a few days after that that we spoke to Porter; that would be perhaps ten or twelve days until the sale was consummated.

"*Q.* Was he in your employ until the sale was made? *A.* We considered so. The sale was made on the fifth of July.

"*Q.* Do you say that he continued in your employment that long? *A.* I have stated how we employed Porter, and you will have to infer from that. We promised to give Porter ten per cent. on \$2,500, and Mr. Porter told us he

could not get but \$1,800. We told him the least we could take was \$2,000, and we could not afford to pay him anything out of that. That was the understanding between us until the time of the sale. He was to get nothing out of two thousand dollars. We could not afford to pay him anything. There was no other arrangement. The next thing we knew was, Porter brought Col. Wall on the ground on the 5th. We did not consider we owed Porter anything out of the \$2,200. Never offered him anything, as we got the extra \$200 through Gilman.

"Q. How do you make that out? Who caused you to make the sale? A. I suppose Porter; he made the sale, and we *supposed* he got the money from Col. Wall.

"Q. All that Porter did you considered a gratuity, for which he was entitled to no pay? A. He was entitled to no pay from us."

Porter, in his testimony, states:

"Synnott and Welch gave me a sort of verbal bond if I should sell the property at such a figure they would give me a certain amount. The arrangement was that they should give me all over two thousand dollars that I could get for the ground. That was in June, 1881; I think about the middle of June. I was to have whatever I could get over two thousand dollars. I was acquainted with the mine and its workings, and the showing as to ore. I made efforts to sell the mine under this arrangement. Made a sale to Col. Wall, the agent for Shaughnessy. The deed was made to Shaughnessy, I believe. Col. Wall went to them about it; and bought it from them; made the trade with them. I went and got Col. Wall to look at the property. I brought the parties together. I had stated the terms upon which the mine could be bought, to Col. Wall. I took Wall to see the property, and told him if he bought the property from them I wanted him to respect my option. He agreed to do it, and agreed to give me \$1,000 for my option, or one-fourth of the mine. *Question.* State, now, particularly, what was the agreement upon your part and upon the others in regard to that option or verbal bond? *Answer.* I was to have all I could get over two thousand dollars. They wanted to get two thousand dollars for the ground. They did not want me to sell the mine at two thousand dollars and then give me any ten per cent. They wanted two thousand dollars, and if they could get that, they were satisfied, and I could have all over. There was no agreement between us that I should have a fixed per cent. on a fixed price."

This was all the testimony on the matter of the arrangement between Porter and the plaintiffs. This testimony indicates that there *may have been*, at one time, an arrangement that Porter was to find a purchaser at \$2,500, and Porter to have 10 per cent. thereof, although Porter swears positively that there was not. The evidence was conflicting, and the court below finds that there was such an arrangement, and that afterwards said arrangement was changed to what was termed a verbal option that Porter was to get the plaintiffs' \$2,000, and he to have all he could get over that sum. The precise time at which the first and last of these two arrangements were made is not stated by either Porter or Synnott. Porter testifies that the latter arrangement was made about the twenty-fifth of June, and was not changed afterwards. Synnott testifies that it might have been May or June. All the talk about this matter occurred before Wall went to look at the mine, and before he had any conference with Porter, as appeared by the evidence. Porter brought the parties,

Wall and plaintiffs, together, and they made their own contract; Porter simply having before stated to Wall that their price was \$2,000, and the parties made their own trade. The fact that Wall finally paid them \$200 more than they had agreed to take, does not change the relation between Porter and plaintiffs.

It is laid down as the law that if an agent act openly, and with the consent of both owner and purchaser, he may contract for and receive a commission from both. *Finerty v. Fritz*, 1 Morr. Min. Rep. 439, and cases cited. And again, if the extent of the agency be merely to bring the parties together, and does not involve the duty of negotiating for either, the agent is termed a "middle-man," and may contract for and receive commissions from both. *Finerty v. Fritz*, Id. 440; *Stewart v. Mather*, 32 Wis. 344; *Shepherd v. Hedden*, 29 N. J. Law, 334; *Herman v. Martineau*, 1 Wis. 151. This is true also if each have agreed to pay the agent a commission, with or without the other's consent, if his duty is simply to bring the parties together. Whart. Com. Law Ag. § 337; *Rupp v. Sampson*, 16 Gray, 398; *In re Owens*, 1 R. 7 Eq. 235, Va. Cas.; affirmed, Id. 424.

It is evident from the testimony of Wall, Porter, and Synnott, all the parties who had anything to do with the sale and conveyance of the mine on the fifth of July, that the trade was made under the last arrangement, as Synnott states that he "did not consider that Porter was to have anything from us; we expected he would get his pay from Wall. We never paid him anything; never offered him anything. Porter never demanded anything from plaintiffs. Wall promised to respect Porter's option. He did so, and paid him the \$1,000 agreed upon." If this arrangement had been reduced to writing, no one would question for a moment the perfect propriety of the arrangement. It would then have been a bond to sell and convey at a fixed price on the part of plaintiffs, and on the part of Porter it would have been an option to purchase at a fixed price. It was precisely what Porter termed it,—a verbal option or verbal bond,—and, when in writing, a very common method of undertaking to find a purchaser for a mine, or to buy one. Would this option be less proper or less binding upon the parties if verbal instead of in writing? Clearly not. The only danger in such case would be the liability of the vendor to demand more, and the liability of the purchaser to refuse to respect the option, the former of which occurred in this case. What was the obligation of Porter? It was evidently understood by plaintiffs that Porter would get his pay from Wall. He was at perfect liberty to get all he could above \$2,000. He could, with perfect propriety, become the purchaser himself.

This whole subject is discussed clearly and at length in case above cited, *Finerty v. Fritz*. In that case the bond was in writing. The court say:

"The bond in question was one of those ordinary title-bonds so extensively employed in the mining regions of this state, [Colorado,] by means of which

those desiring to speculate in mines before purchasing the same outright, procure from the owners an option to buy, on payment of a stipulated price within a fixed period of time; the obligor binds himself to execute a deed to the obligee on performance of the condition. No obligation is executed by the obligee. If the contract proves advantageous to the obligee, he pays the purchase money and receives a deed, otherwise he suffers the time for performance to lapse. * * * The obligee may contract a sale of the property on his own account, and at any price he can obtain."

In this case Porter might have purchased the mine openly from Synnott and Welch for himself. The evidence clearly shows that Synnott and Welch fixed the price upon their own knowledge of the mine. They had worked upon it over a year; had run four tunnels in different places where they thought the showing good. They had opportunity to know, and believed they did know, more about the mine than any other person. They had been trying to sell it to different persons for some months, and had failed. The highest offer ever made them was that of Gilman, which was \$2,200, and that was the day of the sale. The same amount was given them by Wall. It is just as apparent that Wall bought on his own judgment. He might have failed to find a vein, as plaintiffs had done. It is reasonable to suppose that Synnott and Welch had seen the same float themselves, (except the larger piece,) and did not regard it as indicating that the mine was of any more value on account of it. They manifested no interest in it when informed by Gilman. Synnott said he knew better. When Porter accepted the proposition of plaintiffs to sell for \$2,000, with the expressed understanding that he was to have all he could get over that sum, he was then under no obligations to reveal anything he discovered to the plaintiffs. The equities in the case do not seem to be clearly with the plaintiffs, as the learned counsel contend. The plaintiffs sold the mine for \$2,200, on the fifth of July. On the seventh, two days after, they knew, as Synnott testifies, that Porter was to get the \$1,000 from Wall. A few days after that the vein was discovered. The plaintiffs were there and knew all these facts. The defendant proceeded with labor and skill for 10 months, employing a number of hands, until he has spent \$25,000, including the purchase money. He has sold all the ore taken out by plaintiffs, and all he took out himself in his workings, and realized \$2,700. Plaintiffs then bring suit and ask that defendant be required to account to them for this \$2,700; that they be allowed to return to defendants the \$2,200, and receive a deed for the mine. The cause of justice and good conscience is not apparent.

Judgment affirmed.

BRODERICK, J., concurred.

BUCK, J., *dissenting*. In the discussion of this question I shall not consider that branch of the case which is founded upon the law which requires the vendee not to mislead the vendor. While I have been

unable to find any authorities that hold that the words "ore body" are synonymous with or the equivalent of the words "lode," "vein," or "ledge," and therefore have some doubt as to whether the finding that no lode or vein of ore was known, or had been discovered, is responsive to the allegation that the defendant had discovered a lode or *body* of ore; yet I desire to pass by that matter, which may, perhaps, be more technical than practical, and consider that portion of the action which has its foundation in the law of agency.

The complaint alleges, among other things, that said Porter (after entering the employment of plaintiffs) surreptitiously, fraudulently, and collusively, for a consideration, to-wit, \$1,000, paid to him by the defendant, in violation of his said employment of these plaintiffs, and in fraud of their rights, entered into the employment of the defendant, and undertook and agreed to assist him (the defendant) in obtaining the Eureka mining claims from these plaintiffs, by purchase at a price of \$2,200, or a price greatly below its real value, and that by reason of said false, fraudulent, and collusive acts of Porter, and the misrepresentations and concealments of defendant, the plaintiffs were induced to part with the property in question.

I presume it will be admitted that if this allegation is true the plaintiffs are entitled to the relief demanded in the complaint. This seems to me to be the more comprehensive and the most important branch of the case. The large ore body has, in the progress of the trial of the case, as is usual, attracted the most attention; but the *gravamen* of the action, it seems to me, lies in this charge of betrayed confidence, which may be true, even if, as a matter of fact, no ore vein had ever existed within the mine. This branch of the case makes the relation of Mr. Porter to the plaintiffs and defendant a vital issue. That issue is, was he an agent of plaintiffs? If not an agent, was he a principal contracting with the plaintiffs for the purchasing the mine? If not an agent of plaintiffs, was he an agent of defendant? If not an agent of defendant, was he a party in interest with the defendant? If not, was he then the agent of both plaintiffs and defendant? And, if so, was he a factor, broker, or middle-man? The law of the case is different in the several relations, and cannot be determined until this relation is adjudicated. The plaintiffs have a right to demand a finding of fact determining this matter. I am unable to find such a one in the decision of the case by the court below.

The second alleged finding of facts details a conversation between plaintiffs and Porter, whereby a proposition of employment is tendered by plaintiffs and responded to by Porter, and closes with the finding as a fact "that Porter was not invested with any authority to effectuate a sale or bind the plaintiffs or the title to the mine." The vital question, however,—did he have any authority, and if so, what was it?—is not determined.

The fifth alleged finding of facts states that plaintiffs informed Porter that they would sell the mine at \$2,000, but that out of said sum

they could pay no commission; but there is no finding, there or elsewhere, as to whether Porter agreed to act as their agent in selling it at that price, or whether he agreed to buy it.

The findings are so indefinite that different minds arrive at different conclusions as to what was the relation of the parties.

Again, looking into the evidence for the purpose of ascertaining whether the finding that Porter was not invested with authority to sell or to bind the mine, it seems that all the evidence on that point is directly at variance with the finding. In determining the authority of Porter, on the theory that he was employed by plaintiffs, we must look at what he was employed to do, and not what he did under the employment. Synnott, one of the plaintiffs, testified, (Transcript, p. 68:) "I told Porter if he would *sell* the Eureka for \$2,500 we would give him ten per cent. Porter replied, if he got through trying to sell the Homestake he would try and *sell* ours." Again, Synnott says, "I told him I would give ten per cent. if he *sold* the mine," etc. Again, Porter himself says, (Transcript, p. 60,) "Synnott and Welch gave me a sort of verbal bond if I would *sell* the property," etc. He adds, "I made a *sale* to Wall." On page 64 of Transcript Porter says, "They told me if I could *sell* for them and bring them \$2,000, that was all they asked." On page 63 he says: "I had authority to *sell* the mine from about the middle of June. I made *sale* of it on the fifth of July." It is claimed that it appears from what he did that he had no authority to sell. But the charge is that he did not do as he had agreed to do, and it would be a dangerous practice if, on such a charge, we should determine that he was *authorized* to do by what he actually did. I am unable to see that this finding of fact is supported by the evidence; it seems rather to be directly contrary to the evidence of the contracting parties.

If I understand the opinion of the majority of the court, just read, it is based upon the theory that the findings are sufficient to show that Mr. Porter had a contract or verbal agreement with plaintiffs whereby he had what is sometimes called an option to sell, and that, under said authority, he had a right to sell and to appropriate to himself all that he might get over \$2,000. The words of the parties are that he is to sell. Nothing is said of an option. Porter says that *he called* it a verbal bond. I am unable so to construe their contract. The stipulation that he was to have all over \$2,000 if he should sell, (if such there was,) was simply the measure of his compensation. It could not alter his relations to the plaintiffs, or his obligations to them. Assuming the findings to show such a contract, I am unable to see that Porter stood in any other relation than agent of plaintiffs. If I understand the nature of the contract, often made by miners, which is referred to as bonding a mine, it is an agreement between two principals, to the effect that one will sell to the other at a stipulated price within a given time. In *Finerty v. Fritz*, cited in the opinion of the court, such a contract is held to be a sale. The agreement be-

tween plaintiffs was not such a bonding, for Porter himself testifies that, (Transcript, 64,) "I never made a bargain to buy the property, or an arrangement to buy it." On page 78 of Transcript he says, "They or I could have made a sale at any time." If words are to be interpreted according to their ordinary import, Porter was employed to assist plaintiffs to sell the mine, first, at a compensation of 10 per cent. on the purchase price, if sold; afterwards, desiring to increase his compensation, he told the plaintiffs he could only sell the mine for \$1,800. This was not true. He, in fact, did sell it for \$3,200. He however, as Synnott testifies, left them with the impression that he could not do better up to the time of the sale. The plaintiffs did, indeed, get \$2,200 in consequence of a third party, Gilman, offering them that amount. By chance, they protected themselves to that amount against the duplicity of their own employe. Through the representation of Porter that he could not sell for more than \$1,800, and being greatly in need of money, the plaintiffs were induced to agree to take \$2,000. This agreement, however, did not relieve Porter of his obligation as an agent to deal honestly with his principals, and give them all the knowledge that he possessed concerning the value of the mine. He testifies that he concealed the find for the reason that had they known of it they would not have sold for that price.

Again, it is claimed that if the findings show employment of Porter by plaintiffs, he was simply a middle-man to bring the parties together, and that he could lawfully take pay from either. I understand the authorities to be that, while a middle-man may sometimes take pay from both seller and purchaser, he must always deal with the utmost fairness with each. An analysis of the term affords the best explanation of the legal obligations of the parties: a man standing in the middle between two; in the center. Center is defined to be a point equally distant from the extremities. The middle-man must be and remain equally removed in interest from the two for whom he contracts. If he varies from this, even in the estimation of a hair, and gives to one knowledge or advantage which he withholds from the other, he loses his position as a middle-man, and, in the realm of equity, the law will hold him responsible for the position which he really assumes, rather than that which he advertises to occupy. Can it be said that Mr. Porter stands equidistant between the plaintiffs and defendant, when he testifies (Transcript, pp. 64, 65) that "I did not inform the plaintiffs of the fact of my finding ore? I reported it to Col. Wall." And again, "I told Col. Wall I wanted one-fourth of the mine," and that he actually received \$1,000 in lieu of the quarter interest therein.

In *Walker v. Osgood*, 98 Mass. 351, WELLS, J., says:

"Plaintiff's employment as a broker, even if he had no authority to bind his principal, and was intrusted with no discretion in fixing the terms of exchange, and his only service was to bring the parties together, he was bound to perform that service in the interest of the party who employed him."

To a certain extent, and for certain purposes, by the understanding and usage of business and the nature of his employment, a broker is authorized to act for both parties; but what he does in any relation he does as an indifferent person, and not in the interest of either party. It is claimed on the part of the appellants that there is no finding as to the fraud of defendant or his collusion with Porter.

In *Harris v. Burns*, 51 Cal. 528, the court say if the trial court fail to find on an issue of fraud raised, the judgment will be reversed.

In *Le Clert v. Oullahan*, 52 Cal. 254, the court says: "Upon the issue of fraud thus tendered the findings are entirely silent. The cause is not, therefore, in a condition to be decided." In the case at bar it is claimed that if there is no direct finding as to fraud such probative facts are found as necessarily determine the question of fraud. If this is true, it must be that it does so by alleging all the facts, circumstances, and acts of the parties connected with the transaction, in any way bearing upon the question of fraud. But an analysis of the findings will show that, while they set out as facts the conversation of the parties as to the contract of the parties, the evidence of Porter bearing on this question is entirely omitted. He says, (page 64, Transcript:) "I did not inform plaintiffs about the finding of the ore, for the reason that I did not think it to be to my interest. I was working for my own interest, and not theirs." Also the evidence of Mr. Synnott, (Transcript, p. 100:) "Porter told us the most he could get was \$1,800. That was the understanding between us until the sale."

If Porter was in the employment of plaintiffs he had no right to work for his own interest and not theirs. If there was fraud, it arose from this very working for his own interest to the injury of his employers; and if defendant was in collusion with this working for his own interest instead of his employers', the fraud attaches to him also. Hence the defect in the findings upon the question of fraud.

In *Norris v. Taylor*, 49 Ill. 17, and reported in 1 Morr. Min. Rep. 383, is a case so nearly like the one at bar that it seems to me to determine this controversy, provided the findings should establish the facts. The principles involved in this case are fully discussed. Whether they do apply, or what principles of law apply to the case at bar, can only be determined when the issues of fact in the case are adjudicated. The question of the agency of Porter, the question of fraud of Porter, and the collusion of the defendant in such fraud, if any existed, are the vital issues upon that branch of the case which I am discussing. I am unable to understand the findings of the court below as determining these issues, and I am therefore obliged to dissent from the opinion of the court as just read.

(2 Idaho [Hasb.] 150)

LUFKINS v. COLLINS and others.

Filed March 2, 1885.

SALE—DELIVERY—PROPERTY IN POSSESSION OF THIRD PARTY—NOTICE.

When property sold in good faith is at the time in the care and custody of a third person, notice to said third person of the said sale is sufficient to constitute a delivery as to subsequent purchasers or attaching creditors.

Appeal from Alturas county, Second judicial district.

Kimball & Haywood, for appellants.

Prickett & Lamb, for respondent.

BUCK, J. This was an action of claim and delivery, tried at the June term of the district court, 1884. The action was brought to recover the possession of six mules, claimed to have been bought by plaintiff of Adams & Cunningham by bill of sale, dated November 22, 1882. The defendants claimed title to the property by virtue of a bill of sale from the same vendors, dated November 21, 1882. At the time the first bill of sale was executed and delivered to defendants, the property was in the care and custody of the plaintiff on the road-bed of the Oregon Short-line Railroad, then being constructed. The bill of sale was made at Pocatello, Idaho, and the property was about 50 miles from there. The 6 mules were a portion of 71 animals, included in the sale to defendants. Lufkins, the plaintiff, was in charge of said animals, as foreman of Adams & Cunningham, the vendors. On the morning of the day succeeding the sale to defendants, Mr. Stevens, one of the firm of Stevens & Collins, and Mr. Adams, one of the vendors, traveling towards the place where the animals were, met the plaintiff, Lufkins, and Mr. Adams informed him (the plaintiff) that they had sold the stock to defendants, and defendant Stevens then and there hired the plaintiff to continue in charge of the stock as the foreman of the defendants. The plaintiff then agreed to accept said employment, and then entered into the services of defendants.

The said stock was scattered along said road-bed some 20 or 30 miles, the principal portion being at the forty-third mile station. During the said twenty-second day of November, the plaintiff, Lufkins, and defendant Stevens, with Mr. Adams, traveled over the line to said forty-third mile station, where all the stock was turned over. During the evening, while the stock was coming in, Adams & Cunningham executed to plaintiff the said bill of sale, dated on the 22d, in which they sold all "their right, title, and interest" to the six mules in dispute, the said stock being a part of the 71 head enumerated in the bill of sale to defendant made the day before. The plaintiff took possession of said six mules before they had been turned over to defendants, and defendants afterwards took them from plaintiff, and still hold them under claim that the title to the property passed to them, defendants, on the morning of the 22d, when plaintiff, having them in his possession, first received notice of the sale of said stock; the plain-

tiff, on the contrary, claiming that the title passed to him on obtaining possession of the stock on the evening of the 22d, the defendants having up to that time never had the property in manual possession under said bill of sale.

The court gave the following instruction to the jury on the request of the appellants:

"When property sold in good faith is, at the time, in custody of a third person, notice to him of the sale is sufficient to constitute a delivery, as to subsequent purchasers or attaching creditors."

This instruction is the law upon that point. *Benj. Sales*, p. 672, § 675, note *d*; *How v. Taylor*, 52 Mo. 592; *Cofield v. Clark*, 2 Colo. 101; *Dempsey v. Gardner*, 127 Mass. 381, 383. The court also gave, at the request of respondent, another instruction, in which the following language is used:

"But, in order to constitute such delivery, it is necessary that the seller, purchaser, and third party, should all agree."

To this modification of the former instruction the appellants excepted, and assign the same as error. The modification, being a portion of a long instruction asked for on the trial, probably was given without observing that it was a substantial contradiction of the other instruction. It seems to be unsupported by the authorities, and, being a contradiction in terms as to the law of the case, it falls within the rule that "the giving of inconsistent instructions is error, for the reason that the jury will be as likely to follow the one as the other," and also that "an erroneous instruction is not cured by another instruction upon the same subject which is correct, unless the former is specifically withdrawn." *Mackey v. People*, 2 Colo. 13; *Rice v. Olin*, 79 Pa. St. 391; *Thomp. Char. Jur.* § 69; *People v. Campbell*, 30 Cal. 312.

The bill of exceptions contains several exceptions to the ruling of the court in the matter of instructions to the jury, and the admission of evidence, which would be interesting matters of consideration; but the views of the court upon the instruction already discussed being decisive of the case, the limited time at the disposal of the court will prevent a more extended discussion of them.

Judgment reversed, and new trial granted.

MORGAN, C. J., concurs.

BRODERICK, J. I do not question the law as stated in the syllabus of this case. I think it correct; but I cannot assent to all that is said in the opinion.

SUPREME COURT OF OREGON.

(12 Or. 414)

In re Estate of GOLDSMITH and another, Partners, etc.

Filed May 19, 1885.

APPEAL.—INSOLVENT ACT OF OREGON OF 1878—ORDER REMOVING ASSIGNEE.

An appeal will not lie from a decision of the circuit court refusing to remove an assignee appointed under the insolvent act of October 18, 1878.

Henry Ach, for appellants.*Joseph Simon*, for respondents.

THAYER, J. This is an appeal upon the part of White, Goldsmith & Co., creditors of said estate, from an order of the circuit court for the county of Multnomah refusing to remove Rudolph Goldsmith, the assignee of said insolvent debtors, under the act of the legislative assembly of the state to secure creditors a just division of the estates of debtors who convey to assignees for their benefit, approved October 18, 1878. The appellants, on the twenty-first day of October, 1884, filed a petition in the said circuit court, in which they alleged, in substance, that they were creditors of said debtors; that said assignee had failed to file such bond as the law contemplated; that he was a brother of one of the debtors; that he had placed under their control and in their possession the assets of the estate, had paid them large salaries, and did not devote any personal attention to the management of the estate; that the father and brother of one of the debtors, Julius Goldsmith, pretended to have large claims against the estate which the petitioners desired to contest; that immediately preceding the attachment of the property of the debtors, which caused the making of the assignment, the assignee advised and assisted in securing to the wife of one of the debtors, S. M. Cooper, a claim against the firm of \$3,000, and that the assignee had failed to account for \$1,000 in money, alleged to have been on hand at the date of the assignment.

Upon filing the petition an order was made by the said circuit court requiring the assignee to show cause why he should not be removed as assignee of the said estate, whereupon the assignee filed an answer controverting the allegations of the petition, excepting his relationship as the brother to Julius Goldsmith and the employment of the debtors to assist in conducting the business; denying, however, that he paid them more than a reasonable salary, and claiming that their employment was necessary: The proceeding was then referred to a referee to take the testimony of the parties, and report it with his findings of fact and law. In accordance therewith, the referee took a large amount of testimony concerning the matters charged in the said petition, upon which he made a number of findings of fact, generally in support thereof, and found, as a matter of law, that the as-

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signee should be removed. The assignee filed exceptions to the report, which were heard before the said court, and were sustained, and the report set aside. The court, however, required the assignee to give additional security, which he complied with.

The proceeding has been brought to this court for review upon the evidence taken by the referee. The appellants' counsel has presented it with much force, and has submitted cogent reasons for the removal of the assignee; but he was met at the entrance here with an objection to the jurisdiction of this tribunal to hear and determine the matter which I apprehend is insuperable. The objection is that the appointment or removal of an assignee is a matter of discretion; that if the assignee had been found guilty of wasting or misapplying the estate, it would have been discretionary with the court below, under the insolvent act, to remove him or require additional security; and that this court will not review the exercise of such discretion unless it appear that it has been abused. It is also objected that the appeal is taken from a mere interlocutory order, and that it could in no event be taken until the case was finally disposed of by some kind of judgment or final order which in effect terminated the entire proceeding; and it was finally insisted upon by the respondent's counsel that the jurisdiction conferred by the said insolvent act upon circuit courts was limited to those courts. I am of the opinion that the last objection is fatal, whatever might be our conclusions as to the former ones.

The insolvent act referred to vests in the circuit court, and the judge thereof, a supervisory control over assignees therein referred to, and in case of the death of such assignee, or his failure to qualify, authorizes said court or judge to appoint an assignee, and in certain cases to require additional security, and to remove the assignee; but it does not, either by express language or necessary implication, give the right of appeal to this court in any case. The jurisdiction therein granted is only a special statutory authority, to be exercised over a subject not within the ordinary jurisdiction of courts of justice. It is well settled that, although such kind of authority is conferred upon a court of general jurisdiction, yet in the exercise thereof it stands upon the same footing with a court of limited and inferior jurisdiction. *Crepps v. Durden*, 1 Smith, Lead. Cas. (6th Ed.) 1011; *Galpin v. Page*, 18 Wall. 371. Hence it may be inferred beyond question that jurisdiction of that character cannot properly be extended by intendment, and that it necessarily will be confined to the express terms of the act by which it is granted.

The following language of Chief Justice SPENCER, *In the Matter of Beekman Street*, 20 Johns. 270, illustrates this view:

"The powers possessed by this court in appointing commissioners, in reviewing their report, in referring it back to the same commissioners, or substituting new ones, and in finally confirming their report, are derived wholly from the statute. None of these powers exist independently of the legisla-

tive delegation of authority; and they are not incident to our judicial duties. It might be a question how far the legislature can impose such duties upon the judges; but it does not admit of a doubt that, if we do consent to act, we act under a limited and circumscribed authority; and our only powers to act being derived from the statute, we possess no powers but such as are expressly given, and those powers must be exercised in the manner designated by the act. It is true, we act collectively and in term time, and a majority control the proceedings; but we act as commissioners, and in the same way and manner as we used individually to do under the insolvent act. The statute is our guide, and we must proceed by the rules and in the manner it prescribes. The general powers and jurisdiction of this court as regards the application now before us cannot be brought into exercise. They do not apply to such a subject."

In the Matter of Mount Morris Square, 2 Hill, 14, the same doctrine is declared. If, therefore, the power vested in the courts by virtue of the insolvent act of October 18, 1878, in proceedings had in conformity to its provisions, extends no further than the express provisions of the act, then this court has no right to entertain jurisdiction of the said appeal, for the obvious reason that no such right is therein conferred. It is analogous to the jurisdiction in bankruptcy specially delegated to the lord chancellor of England, committed to him as keeper of the great seal. In the discharge of that jurisdiction he exercised all the powers of his court, but no appeal lay from his decisions in such cases, because no law had been passed authorizing such appeal. *Ex parte Cowan*, 3 Barn. & Ald. 123. The general statutes of this state only authorize an appeal from a judgment in an action or decree in a suit. The determination in this proceeding is neither, and it will require a special enactment to give an appeal therefrom. This appeal must therefore be dismissed.

LORD, J., concurred.

(12 Or. 271)

BUDD v. MULTNOMAH ST. RY. CO.

Filed May 13, 1885.

TROVER—CONVERSION OF SHARES OF STOCK.

An action of trover may be maintained for the conversion of shares of capital stock of a corporation.

Appeal from Multnomah county.

D. W. Welty and J. C. Moreland, for respondents.

H. D. Bingham and J. C. Bower, for appellant.

LORD, J. This is an appeal from a judgment upon demurrer. The action was in trover, for the conversion of certain shares of the capital stock of the corporation defendant. The complaint in substance alleges that the plaintiff was the owner of 100 shares of the capital stock of said corporation defendant, to the value of \$10,500, and that the defendant wrongfully took possession of said shares, and disposed

of and converted the same to their own use. The demurrer to the complaint was sustained, upon the ground that trover would not lie for the conversion of shares of stock. The only question, therefore, presented by this record is: "Are shares of stock such personal property as an action for conversion will lie for their appropriation? What is stock, or a share of stock?" "A share in a corporation is a right to participate in the profits, or in the final distribution, of the corporate property *pro rata*." *Field v. Pierce*, 102 Mass. 261. "A share or interest in the capital stock of a bank or other corporation may be defined as the right to *pro rata* periodical dividends of all profits, and if the corporation is not immortal, a right to a *pro rata* distribution of all its effects on its death." *People v. Commissioners*; etc., 40 Barb. 353. "Shares of stock are generally considered to be personal property," (Bouv. Law. Dict. "Stock,") and by our statute are to be deemed personal property, and subject to attachment, execution, levy, and sale as such. Misc. Laws, c. —, § 13. They are not "chattels personal, susceptible of possession, actual or constructive," (*Arnold v. Ruggles*, 1 R. I. 165;) "but they are," says SHAW, C. J., "if not choses in action, in the nature of choses in action; and, what is more important, they are personal property." *Hutchins v. State Bank*, 12 Metc. 421. Of the nature of shares, and the right or interest in them, considered as such, DUFFEE, C. J., said:

"Does the term 'share' denote a thing in possession, or does it denote the mere right to a thing not in possession, but in action, and therefore subject to be claimed or demanded? We have shown that a right to a vote as a member of the corporation, and a right to the dividends of the profits of the concern, make all the beneficial interest that is called a share. But these rights subsist only in law or in contract. The individual invested with them has them *in præsenti*, and in virtue thereof claims things that are not at any time all present, uniting possession with right; for all votes save one, and all dividends save one, must always exist *in futuro*—a chose not in possession—a thing subject to be demanded—money payable at a future day. A share, then, is a mere ideal thing; it is no portion of matter; it is not susceptible of tangible and visible possession, actual or constructive. Yet, in common parlance, we say that a man is possessed of a right, and it is a sufficiently intelligible mode of speaking; but then the meaning of the term 'possession' must be understood to be modified by the object to which it relates. If a right be an ideal thing merely, or something existing but in law or contract, the possession must be ideal—subsisting from law or contract. To be possessed of a share, therefore, is to be invested with the rights which constitute it, to pass in and succeed to the station, relation, and powers of the former shareholder, and to become a corporation in reference to the particular share. But it is quite evident that this cannot be accomplished but by actual transfer, or by operation of law. This—this only—can give (in common parlance) the possession of a mere right, or those rights denominated a share in a corporation."

Whenever, therefore, these things are done or happen, whether by means of contracts or by operation of law, by which an individual is invested with those rights which constitute a share in the stock of a corporation, he is, so to speak, possessed of such share—the owner of

it. It is not the certificate which confers the right to or ownership of the share, nor is it the stock itself, but only the paper evidence of the right or title to the share which may be used for the purpose of symbolical delivery; as the share itself, being intangible, is not susceptible of actual delivery. As thus evidenced, the certificate is the written expression of the legal existence of such share, giving to that which is intangible a tangible representation, by which, as a convenient method, it may be sold, transferred, or speculated in as other personal property. A share, then, exists, in legal contemplation, and is personal property which may be dealt with, enjoyed, and subjected to judicial process as such, and of which the certificate is not the property itself, but only documentary evidence of title to it. Being thus impressed by law with the attributes of personal property recognized as such, capable of being enjoyed, dealt with, and subjected to judicial process, it would seem to follow that whenever there has been some repudiation by the defendant of the owner's right to the share, or some exercise of dominion or control over it inconsistent with such right, he is guilty of a conversion, and ought to be held liable in trover. A conversion is defined to be "a wrong, consisting in dealing with the property of another, as if it were one's own, without right." Abb. Law Dict. "Conversion." Judge COOLEY defines it to be: "Any distinct act of dominion, wrongfully exerted over one's property in denial of his right, or inconsistent with it, is conversion." Cooley, Torts, 448. Mr. Bigelow says: "It may be laid down as a general principle that the assertion of title to or an act of dominion over personal property inconsistent with the right of the owner is a conversion." Big. Lead. Cas. 428. Nor is it necessary to show a manual taking of the thing in question, nor that the defendant has applied it to his own use. "Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's rights? If he does, that is in law a conversion, be it for his own or another's use." Bac. Abr. "Trover." The wrong lies in the interference with the owner's right to do as he will with his own. Whoever does this in any manner subversive of the owner's right to enjoy or control what is his own, is guilty of a conversion. *Rainsby v. Bailey*, 11 Or. 51. But the defendant contends that a share of stock, being intangible, is incapable of being taken and wrongfully converted to the use of another; and, as a consequence, that the allegation that the defendants wrongfully took, disposed of, and converted the said shares to their own use is the statement of an impossible fact, and tenders no issue. In support of this position, *Sewall v. Bank of Lancaster*, 17 Serg. & R. 285, and *Neiler v. Kelley*, 69 Pa. St. 407, are cited and relied upon. In the latter of these cases, SHARSWOOD, J., said:

"A share of stock is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of the corporation, never realized except upon the dissolution and winding up of the corporation, with the right to receive, in the mean time, such profit as may be made and declared in the

shape of dividends. Trover can no more be maintained for a share in the capital stock of a corporation than it can for the interest of a partner in a commercial firm."

As based upon the common-law fiction of property lost and found, in actions of trover, which prevails in that state, and which lay only for tangible property capable of being identified and taken into actual possession, the correctness of the decision is not questioned. "But," as was said by PARKE, C. J., "what matters it whether the thing itself is capable of being taken into hand and carried away, so long as it is personal property of as substantial value as any other; and in no case can the thing itself be recovered in this form of action, but only its value. There was force in the claim originally, when trover was confined to property lost. From the nature of the action it could not then lie unless the property was tangible. The fiction of lost property is still retained in declarations of this kind, but the allegation has long since ceased to be substantial, and there is no longer any reason for requiring that the property should be tangible. * * * If a certificate of stock is unlawfully retained when demanded, what is presumed to have been converted? The certificate has no intrinsic value disconnected from the stock it represents. No one would say that the paper alone had been converted,—that the conversion of the paper constituted the entire wrong. The real act done in such cases is precisely the same as done here,—no more, no less; and to say that trover will lie in one case and not in the other, is to make a distinction where in reality there is no difference. Conversion is the gist of the action of trover. Everywhere it is so held. The stock in both cases was converted; and we think in these days, when the tendency of courts is to do away with technicalities not based upon reason, a technical distinction of this character should no longer be sustained."

In *Payne v. Elliot*, 54 Cal. 339, in an able opinion by MCKEE, J., it was held, in an action for the conversion of shares of stock of a corporation, that "it is the shares of stock" which constitute the property, and not the certificate; and that an action is maintainable for the conversion of the share of stock which the certificate represents, as well as that of the certificate.

In *McAllister v. Kuhn*, 96 U. S. 87, the identical objection was made which is raised here. There the judgment had been taken by default, and confessed whatever had been properly pleaded, as the demurrer here admits. In that case WAITE, C. J., said:

"If the statements contained in the petition are true, and McAllister had actually converted the stock to his own use, Kuhn was entitled to damages. By his default, whatever had been properly pleaded was confessed. Had issue been joined upon the averment of conversion, it would have been necessary to show the existence of facts which in law constituted a conversion; but, for the purposes of pleading, the ultimate fact to be proved need only be stated. The circumstances which tend to prove the ultimate fact can be used for the purposes of evidence, but they have no place in the pleadings. We

think the complaint does state all the facts necessary to constitute a cause of action."

Under our system, the technical difficulty which embarrassed the common-law action for trover, and made it only applicable for the conversion of tangible property, no longer exists, and the action may be maintained for the conversion of every species of personal property. We think the complaint states the necessary facts to constitute a cause of action. The demurrer is not well taken, and the judgment must be reversed.

(12 Or. 289)

NEIL v. TOLMAN and others. (Two Cases.)

Filed May 19, 1885.

WATER-RIGHTS—BEAR CREEK—FORMER ADJUDICATION.

As, in a former suit, the right of defendant to divert the water from Bear creek by means of the ditch in question in this suit has been established, *held*, that decree of the lower court, following such decision, should be affirmed, except as to the quantity of water which defendant is entitled to; and, as modified, the decree is affirmed.

Appeal from Jackson county.

J. A. Neil and George H. Williams, for appellants.

W. K. Hanna, John Kelsay, and C. B. Bellinger, for respondents.

LORD, J. These suits, being similar, were consolidated and tried together, the evidence being applicable to both cases. They were brought to enjoin the defendant from diverting the water of Neil or Bear creek.

The complaint in the case of Claiborne Neil alleges in effect that the plaintiff is the owner of certain land in Jackson county, which lies along Neil creek, and embraces both banks and the channel of such creek; that the plaintiff is entitled to the use of all the water of such creek for irrigation, watering of stock, and for domestic purposes, and that during the summer months he needs all such water therefor; that he has so used the water since 1855, except when wrongfully deprived of it by the defendants; that the defendants have a ditch leading from a point on Neil creek about one mile above plaintiff's land, along the foot of the hills and away from said stream about two miles to Clayton creek; that by means of such ditch defendants divert the water of Neil creek away from and around plaintiff's land, and use up and waste such water in irrigating several farms, so that it never returns to said Neil creek; that at no time prior to 1875 did defendants use more than 60 inches of water through such ditch, but that since that date defendants have diverted more than that quantity, and that during the last three years they have diverted all the water during the summer months except about 15 inches, and have diverted during said three years more than 150 inches, under a 6-inch pressure, and are now diverting nearly all of the water of said creek, and plaintiff has now no water for irrigating, and his crops and orchards are suffering from the want thereof; that defendants threaten

to continue such diversion, etc.; that plaintiff has always objected to and protested against such diversion; yet the defendants have by force and threats persisted therein.

The complaint in the second case—that of Leander Neil and wife—is, in effect, the same as that in the case of C. Neil.

The answer in the case of C. Neil denies plaintiff's allegations as to his right to the use of all the water of Neil creek, and denies his right to use, or that he needs, any of such water, except so much as remains in said creek after the defendants have taken therefrom so much as they are entitled to, which amount is stated in a subsequent part of the answer; denies the continuous use alleged by plaintiff. The answer denies all the other allegations of the complaint, except that as to the ownership by plaintiff of the land described, with certain qualifications which appear in the affirmative allegations of the answer.

The answer alleges, affirmatively, that in the year 1852 the ditch mentioned in the complaint was constructed by the defendants and their grantors for irrigation and other purposes, and that they and their grantors have had the continuous and uninterrupted use and enjoyment of the water so taken by them adversely to plaintiff, and all other persons, too, and until they were enjoined by this court in 1883, and that they have had the use of said ditch for more than 30 years last, before the commencement of this suit, and that they diverted a part of said stream and not the whole of it. The answer further alleges that defendants diverted by their said ditch not less than 160 inches of water by its natural flow, and under no other pressure than a fall of three-fourths of an inch to the rod. That since the year 1867 they have diverted water in said ditch from said creek as follows: From January 1st to August 15th, 160 inches; from August 15th to September 20th, 100 inches; and from September 20th to January 1st, 60 inches, and no more, by its natural flow through a ditch having a fall of three-fourths of an inch to the rod, and no other pressure and no greater quantity than herein stated. The answer further sets up a former adjudication of the same matter, by decree of injunction rendered by the circuit court of Jackson county, Oregon, on June 16, 1873. All the material allegations in the answer are denied by the replication.

The questions raised and contested by the pleadings in this suit are: (1) Did the defendants acquire any right as against plaintiff to divert the water by reason of prior appropriation? (2) Have they acquired any title by prescription from adverse use? (3) Was there any former adjudication which can estop the plaintiff in this suit? Our examination of these defenses will be in the inverse order in which they are here presented, and will extend only so far as the decision of the cases may require.

The first inquiry, then, will be: Has there been a former adjudication which estops the plaintiff? In June, 1873, the defendants be-

gan a suit in equity, in the circuit court of Jackson county, to restrain the plaintiff Neil from diverting the water of the ditch in question. The complaint in that case particularly described the ditch of which it is alleged they were the owners, and that said ditch and the waters thereof were necessary for the irrigation of the meadows, orchards, and grain crops of the plaintiffs, and for the use of their farms, and that the defendant at divers times had broken said ditch and diverted the water therefrom, so as to prevent the plaintiffs from the enjoyment and free use of the benefit thereof, and he threatened to continue so to do. The plaintiffs prayed that the defendant might be forever restrained from breaking or molesting the ditch, and from diverting the waters thereof. The record shows that the defendant was duly served with process, but made default, and a decree was rendered in accordance with the prayer of the complaint. That the ditch in that and this case is the same identical ditch is not disputed. In both cases the facts show that the ditch tapped and received its supply of water from Neil or Bear creek, which was conducted by means of it to the farms of the plaintiffs, for the purposes of irrigation, and which otherwise would have flowed down the channel of the creek through the farm of the present plaintiff. This is necessarily so, from the facts as stated, and renders all discussion of the water and ditch separately, considered as applied to the rights sought to be established and the injury prevented, as idle and unmeaning. The object of the former suit was plainly to prevent the plaintiff Neil from diverting and using the water conducted from Bear creek by this ditch, and to protect the defendants in the use of such water thus derived for the purposes of irrigation. The object of the present suit is to prevent the defendant from diverting the waters of Bear creek by means of the same ditch for the uses of irrigation, and to protect the plaintiff in the use of such water as the riparian proprietor. In either case, the right of the plaintiff to the water rested upon the same principle, and the gist of the suit then and now is to determine the right to this water.

The record discloses that the diversion of the water from Bear creek has been for years the subject of contention and dispute. Prior to the suit instituted in 1873, the plaintiff claimed that the defendants had no right to take the water from the creek and run it in this ditch to irrigate their farms; that he was entitled to have the water of the creek flow down its channel as a riparian owner; and it was evidently in assertion of his right as such that he broke the ditch and turned the water back where he conceived it lawfully belonged. On the other hand, the defendants claimed that they had such right, and to establish it, settle the contention, and afford the plaintiff an opportunity to make whatever defense he had, the former suit was brought. The injury complained of, and to be prevented by that suit, was the deprivation of the water. The breaking of the ditch only occasioned the injury. Certainly, if the plaintiffs in that suit were not

entitled to the use of the water as alleged, and if the defendant was entitled to such use as he now alleges in the present suit, such facts would have constituted a complete defense. The rule is well settled that "a party cannot relitigate matters which he might have interposed, but failed to do, in a prior action between the same parties or their privies in reference to the same subject-matter." Wells, Res Adj. § 251, citing *Hackworth v. Zollers*, 30 Iowa, 433; *Hites v. Irvine's Adm'r*, 13 Ohio St. 283; *Le Guen v. Gouverneur*, 1 Johns. Cas. 438; *Gray v. Dougherty*, 25 Cal. 266. In some of the cases the rule has been carried to the extent of declaring that "if a party fails to plead a fact he might have pleaded, or fails to prove a fact he might have proved, the law can afford him no relief." Wells, Res Adj. § 251; *Bell v. McColloch's Ex'rs*, 31 Ohio St. 397; *Ewing v. McNairy*, 20 Ohio St. 322; *Embury v. Conner*, 3 N. Y. 511; *Covington, etc., Co. v. Sargeant*, 27 Ohio St. 233; *Le Guen v. Gouverneur*, *supra*. In other cases it is said that the test is to determine whether the matter which is claimed to be barred, might have been litigated under the pleadings. *Columbus & S. R. Co. v. Watson*, 26 Ind. 52; *Duncan v. Holcomb*, Id. 378; *Sheets v. Selden*, 7 Wall. 416; *Beloit v. Morgan*, Id. 619; *Henderson v. Henderson*, 3 Hare, Ch. 115.

The finality of judgments rests upon the maxim, *interest reipublicæ ut sit finis litium*. "It is for the public good," says Mr. Broom, "that there be an end of litigation; and if there be any one principle of law settled beyond all question, it is this: that whensoever a cause of action, in the language of the law, *transit in rem judicatam*, and the judgment remains therein in full force and unreversed, the original cause of action is merged and gone forever." Broom, Leg. Max. "It is not only final," says RADCLIFFE, J., "as to the matter actually determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided. The reasons in favor of this extent of the rule appear to me satisfactory; they are found in the expediency and propriety of silencing the contention of parties, and of accomplishing the ends of justice by a single and speedy decision of all their rights. It is evidently proper to prescribe some period to controversies of this sort, and what period can be more fit and proper than that which affords a full and fair opportunity to examine and decide all their claims. This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention. A different course might be dangerous and oppressive; it might tend to unsettle the determinations of law, and open a door for infinite vexation." Nor is the principle of the rule affected, that the judgment was obtained by default. "The rule," says Mr. Freeman, "that a judgment is conclusive of every fact necessary to uphold it, admits of no exception; and is equally applicable whether the final adjudication resulted from the most tedious and stubborn litigation, or from a suit in which no obstacle was possible to delay or defeat plaintiff's recovery. A judgment by default

is attended with the same legal consequences as if there had been a verdict for the plaintiff. There exists no solid distinction between a title confessed and one tried and determined." Freem. Judgm. and note. "So the neglect of a defendant to answer, and a decree *pro confesso*, are equivalent to an admission of the allegations of the bill as to all parties against whom such a decree passes." 6 Wait, Act. & Def. 71; *Brummagin v. Ambrose*, 48 Cal. 368. "The judgment is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have decided as incident to or essentially connected with the subject-matter of the litigation, within the purview of the original action, either as a matter of claim or defense." MILLER, J., in *Jordan v. Van Epps*, 85 N. Y. 427. See, also, *Barrett v. Failing*, 8 Or. 152; *Bloomer v. Sturges*, 58 N. Y. 168; *Embury v. Conner*, 3 N. Y. 512. Nor is it any objection that "the former suit embraced more subjects of controversy or more matter than the present; if the entire subject of the present controversy was embraced in it, it is *res judicata*. No man is to be twice vexed with the same controversy." *Bigelow v. Winsor*, 1 Gray, 302; *Tiogo R. R. v. Blossburg R. R.* 20 Wall. 137.

The right sought to be established and determined in this suit involves, in fact, the same identical question which was presented in the former suit, only with this difference: a change of characters as parties to the suit. It follows, as the court below decided, that the former decree is a bar to this suit, in that it established the right of the defendant to divert the water from Bear creek by means of the ditch in question. But it did not determine how much or the quantity of water the defendants were entitled to divert. This fact was recognized by the eminent counsel for the plaintiff, and he sought to show, by an able and elaborate investigation of the evidence, that the conclusion which the court below reached as to the quantity of water the defendants were entitled to divert, could not be sustained upon the evidence.

The record discloses that the court below gave to this case that careful investigation which its importance to the rights involved demanded, and only reached the result now complained of after such deliberation. Since the argument I have re-examined the testimony with much care and attention, seeking to ascertain the true quantity of water which the defendants are entitled to divert, and I confess the result of my inquiries has not fully satisfied me that there is error in the amount adjudged by the court below. It is suggested, however, that there are some facts and circumstances which may possibly have escaped the attention of the court below, or perhaps not received that full consideration to which they are supposed to be entitled by their weight and importance. Among them are the gradual enlargement of the ditch by frequent cleaning, and the natural "wear and tear" of flowing water, the building of a flume with a certain incline, which presents less obstruction to the flow of the water than

the natural surface, all of which, and together, it is claimed, have materially contributed to increase the quantity of water much beyond that formerly or originally diverted. It is not doubted but that these causes may have produced that result, if no precautions were taken to prevent it at the point of diversion. But there is some evidence that such precaution was taken; other, that it was insufficiently done; other, in effect, that it was not done at all. The measurements of the water vary very much, and some of them are taken at places and under circumstances that render them unfit tests. The witnesses are all reputable, good citizens, testifying to what they understand and believe to be a correct state of facts. In such conflict of testimony it is always not only a matter of delicacy, but of difficulty, to adjust the conflicting statements, and to determine the right of the matter. An approximation to it is all that can be reasonably expected.

Without reviewing the evidence, it is thought, therefore, in view of all the facts, and the rights and equities of the parties, the decree should be modified in the particular, viz., 120 inches instead of 160 inches, from January 1st to August 15th; but in all other respects the decree is affirmed; and it is so ordered. In the other case we think the evidence shows the right by prescription. The costs and disbursements will be equally divided between the parties.

(12 Or. 280)

JACOBSON v. SIDDAL.

Filed May 19, 1885.

1. HUSBAND AND WIFE—ACTION FOR CRIM. CON.—EVIDENCE OF MARRIAGE.

In an action for criminal conversation, the record of the marriage is not essential, but the marriage may be proved by the testimony of the husband and wife.

2. SAME—DAMAGES—RELATIONS OF PARTIES—EFFECT ON BODY AND MIND OF WIFE.

In such an action, evidence of the terms on which the husband and wife lived together, and the effect the criminal act produced on her body and mind, may be proved.

Appeal from Wasco county.

J. H. Bird, for appellant.

W. Lair Hill and *F. P. Mays*, for respondent.

LORD, J. This action was brought by the plaintiff to recover damages for alleged criminal conversation with his wife. Upon issue being joined the trial proceeded, and the plaintiff gave and offered the evidence set forth in the bill of exceptions, when the defendant moved the court for a nonsuit upon the grounds (1) that plaintiff had failed to prove the alleged marriage; (2) that he had failed to prove any damages sustained by him, or any facts from which a jury would be authorized to find damages for the plaintiff; and (3) that he had failed to prove a cause sufficient to be submitted to a jury. The court below granted the motion, and judgment was entered in favor of the defendant for costs, from which this appeal has been taken.

The basis of the plaintiff's right to recover arises out of the alleged relation of husband and wife, and the fact of marriage must be proved by direct evidence. By the bill of exceptions it appears that after the plaintiff and his wife had testified directly to the fact of marriage, a certificate of the same was offered in evidence, to which several objections were made and sustained. Whether the objections were well taken or not is immaterial, as the plaintiff was competent to testify to the marriage. The contract of marriage, or its solemnization before a minister or magistrate, may be proved by the testimony of an eye-witness, and for this purpose a party is competent. In *Bissell v. Bissell*, 55 Barb. 829, the court say:

"In cases affecting the legitimacy of issue, right of succession to property, and many other cases, such a contract may be proved by circumstantial evidence, by admission of the parties, by living together as man and wife, etc. But there is another class of cases, such as prosecutions for bigamy, *crim. con.*, etc., in which there must be direct evidence of the actual marriage. By actual marriage is meant, not the solemnization before a minister or magistrate,—for, as has already been shown, no such solemnization is requisite,—but what is intended is that the actual making of the marriage contract between the parties must be proved by direct evidence, and not left to be inferred from circumstances, and admissions, and the like. Until, by recent legislation, the wife was made a competent witness in actions in which her husband is a party, it is evident that when a marriage of this description was contracted in the absence of witnesses, there was no means of furnishing the direct proof required in this class of cases, and offenses of this description might be committed with comparative impunity. But now, the wife being made a competent witness, her testimony, if corroborated and entitled to credit, is sufficient to establish the marriage."

The certificate, properly authenticated, or the record of the marriage, is not essential to the establishment of the relation of marriage, but the party may prove the fact of marriage. The record shows that both the husband and wife, in substance, testified that they were such, that they were married about eight years ago in Iowa, and that ever since they had lived together as husband and wife; and that this testimony was received without objection. In *Kilburn v. Mullen*, 22 Iowa, 503, the court held that record evidence is not indispensable to prove a marriage, but that the fact may be established by witnesses having knowledge thereof. This was an action for criminal conversation, and the court, by DILLON, J., followed the rule laid down in *State v. Wilson*, 22 Iowa, 364, in which he said:

"We are aware of the state of the authorities touching this question, but do not deem it necessary to enter at large upon its discussion. We have heretofore made a similar ruling in relation to bigamy, where the rule should be at least as stringent as in a prosecution for adultery." *State v. Williams*, 20 Iowa, 98.

"Where direct evidence of the marriage is required," said PERLY, C. J., "other evidence besides the register may be made by the testimony of witnesses present at the marriage, or of the parties themselves, when competent." *State v. Marvin*, 35 N. H. 22. See, also, *Com. v. Norcross*, 9 Mass. 492; *Com. v. Littlejohn*, 15 Mass. 163. Our statute

has very materially invaded the common-law rule, and, subject to the restrictions enumerated, the husband or wife is a competent witness. Code, §§ 700, 702; Abb. Tr. Pr. 684. Subject to these limitations, and for the attainment of truth, it is not perceived why all persons having knowledge of the facts, and especially those ordinarily most conversant with them,—the parties themselves,—should not be permitted to testify. Besides, it seems if the testimony was incompetent, but was admitted without objection, the court will treat the testimony as competent on motion for nonsuit. *Janson v. Brooks*, 29 Cal. 214.

The next objection is that the court erred in excluding testimony offered to show the terms on which the plaintiff and his wife lived together, and the effect the criminal act produced on her body and mind. The substance of the allegation in the complaint is that the carnal intercourse was effected by forcible ravishment. The defendant contends that the gist of the action is loss of service. In a note to Chit. Pl. marg. p. 642, note *b*, and 856, note *a*, it is said the wrong complained of is not immediate, but consequential; the gist of the action not being the supposed assault on the wife, but the consequent corruption of the body and mind of the wife. In *Weedon v. Timbrell*, 5 Term R. 360, Lord KENYON said:

"It is material to consider what is the gist of the action. The plaintiff contends it is the criminal act; but that I deny. I think it is a civil action, brought to recover satisfaction for a civil injury done to the husband, and not to punish the defendant for having broken the laws of morality and decency."

And it was held that the gist of the action was the loss of the society and comfort of the wife. It is the loss of consortium which is the gist of the action. "The plaintiff," said ALLEN, J., "cannot maintain this action for an injury to the wife only; he must prove that some right of his own, in the person or conduct of his wife, has been violated. * * * His interest is expressed by the word '*consortium*'—the right to the conjugal fellowship of the wife; to her company, co-operation, and aid in every conjugal relation. * * * The essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the *consortium* with his wife; of comfort in her society, in that respect, in which his right is peculiar and exclusive." *Bigaouette v. Paulet*, 134 Mass. 123; *Fry v. Drestler*, 2 Yeates, 278; *Wood v. Mathews*, 47 Iowa, 410; Abb. Tr. Ev. 685; 1 Chit. Pl. (marg.) 134, 167. Nor are the rights of the plaintiff affected in such cases, whether the act was done by the consent of the wife, or was accomplished forcibly and against her will, except in aggravation or mitigation of the injury. "The common law, in giving this remedy, instead of making the husband's right of action depend on his wife having consented to her defilement, has invariably, whatever the truth might be, decisively assumed that she did not assent, but was.

overcome by force, and the action has been sustained, just the same, whether, as a matter of fact, her will consented or she was outraged by actual violence. Bac. Abr. "Marriage and Divorce," 551, 553; 3 Bl. Comm. 139; 1 Chit. Pl. (16th Amer. Ed.) 140, 141, 150, 151, 188; 2 Hil. Torts, 507; *Forsythe v. State*, 6 Ohio, 23. And there seems to be no basis in justice or policy for the position that, if the personal wrong is accompanied by circumstances of such atrocity as to elevate it to the public offense of rape, the private remedy is either taken away or suspended. Cooley, Torts, 86, 90; GRAVES, J., in *Egbert v. Greenwalt*, 44 Mich. 246. The injury done the husband consists in the dishonor of his marriage bed, the loss of his wife's affection, and the comfort of her society, as well as any pecuniary injury for loss of services. The actual injury, and the extent of it, very greatly depends on their prior relations, and the consequences, as between them, resulting from her defilement or defection. The plaintiff had a right to show the terms upon which he and his wife had lived together, and the practical consequences resulting to their married life from the injury alleged. Upon the question of damages, the relation of the plaintiff to his wife, the circumstances of their domestic life, etc., may be shown. Cooley, Torts, 224, 225; Hil. Torts, p. 509, § 21. But this the counsel for the defendant concedes, and admits the error assigned to be well taken, if the gist of the action is not specifically for loss of services, and the pecuniary injury confined to it. But, as the law is otherwise, the judgment must be reversed, and a new trial ordered.

(12 Or. 276)

WEINER v. LEE SHING and others.

Filed May 19, 1885.

1. PLEADING—ACTION FOR SERVICES—ASSIGNMENT OF CLAIM.

A complaint alleging that "defendants employed B. to perform services for them, for which they promised to pay said B. \$1,000, on or before May 1, 1884, and that on May 16, 1884, said B., for a valuable consideration, assigned said claim to plaintiff, who now owns the same, and upon which there is now due and owing the sum of \$1,000," is insufficient.

2. SAME—VERDICT CURES WHAT DEFECTS.

If a complaint is defective in not containing some material allegation, the defect will not be cured by verdict.

Appeal from Multnomah county.

W. H. Adams, for appellants.

W. Scott Bebee, for respondent.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Multnomah, rendered in an action commenced in that court by the respondent against the appellants to recover money. The action was tried by a jury, and resulted in a verdict for the respondent for the sum of \$1,000, the amount claimed to be due. Among the questions raised upon the appeal is that the complaint does not state facts sufficient to constitute a cause of action. The following is the substance of the complaint: -

"That Lee Shing and Lee Shing Tin are, and during all the times herein mentioned were, partners, doing business at Portland, Oregon, under the style and firm name of 'Quon Wo On,' and that during the year 1883 said above-named defendants and Ah Foo employed Gaston & Beebe to perform services, for which they promised and agreed to pay said Gaston & Beebe the sum of \$1,000 on or before May 1, 1884; that on May 16, 1884, said Gaston & Beebe, for a valuable consideration, assigned said claim to plaintiff, who now owns the same, and upon which there is now due and owing the sum of \$1,000. Plaintiff therefore asks judgment against defendants for \$1,000, and costs and disbursements."

The respondent's counsel claims that if the complaint would have been held insufficient upon demurrer, by reason of any defect apparent upon its face, such defect has been cured by verdict. The rule is no doubt correct, that where the statement of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor. But where no cause of action is stated, the omission is not cured by verdict. Gould, Pl. 453, § 13. The reason of the rule as stated in the section is there explained by the following quotation from a decision made by Lord MANSFIELD:

"To entitle him [the plaintiff] to recover, all circumstances necessary in form or substance to complete the title so imperfectly stated, must be proved at the trial; and it is, therefore, a fair presumption that they were proved."

It is not always an easy matter to determine whether such defect is in the statement of the title or cause of action, or a defect in the title or cause of action. The verdict does not supply any fact omitted from the complaint, but it establishes every reasonable inference that can be drawn therefrom. If the complaint is defective in not containing some material allegation, the defect will not be cured by verdict. In this case, the gist of the action was a promise to pay the thousand dollars, but that promise, standing alone, was *nudum pactum*. No right of action in such case arises in favor of the promisee in consequence of its breach. The facts showing that the promise was binding, had to be alleged. The plaintiff, in such a case, must show by his complaint, not only that the defendant made a promise that he had broken, but also that the promise was made upon sufficient consideration; and, unless the allegation in this complaint, that the defendant employed Gaston & Beebe to perform services, directly or by necessary implication avers a sufficient consideration for the promise to pay the \$1,000, the cause of action was defective.

The said allegation is the statement of an executory consideration. The employment of Gaston & Beebe was to "perform services." It was something to be done by those parties. No other construction can be placed upon the words employed. In declaring upon such a promise it is always necessary to state the particular consideration upon which it was founded, and it is essential that the consideration stated should be legally sufficient. 1 Chit. Pl. 293. The learned author also says (pp. 295, 296) that in the statement of an executory consideration a greater degree of certainty is required than in

that of an executed consideration. "The consideration and the promise of the defendant are two distinct things. In order to show that the plaintiff possesses a right of action, it is, in general, necessary to aver performance of the consideration on his part, which allegation, being material and traversable, must be made with proper certainty of time and place. This obligation of averring performance imposes upon the plaintiff the necessity of stating the consideration with a greater degree of certainty and minuteness than in the case of executed considerations; for the court would otherwise be unable to judge whether the performance averred in the declaration were sufficient." These requirements are certainly very reasonable. A naked promise to pay a sum of money, unless in a promissory note or in an instrument under seal, imports no consideration. The first inquiry of the mind is, where such promise is alleged to have been made, what was it for? The plaintiff who seeks to enforce the promise must answer that inquiry satisfactorily. He must show that it was made upon a consideration legally sufficient, and, if an executory consideration, that he has performed it, or legally obligated himself to perform it, and been ready and willing to carry out his undertaking in that behalf; if an executed consideration, that it was performed by the promisee at the request of the promisor.

These rules of pleading have been maintained by able courts for centuries; they are the soul of reason, and should be enforced between all classes of persons involved in litigation, of whatever complexion. It is hardly necessary to say that the respondent's complaint wholly fails to conform to the rules referred to. It fails to disclose what the employment was. The court could not know from it whether the employment were to do a lawful or an unlawful thing, and there is no pretense in the complaint that the parties performed it, whatever it was. The respondent may as well have counted upon the breach of a bare promise to pay the money as upon the meager facts alleged. All that can be claimed to be alleged is an employment to do services. The complaint would have been improved by a statement showing what Messrs. Gaston & Beebe were employed to do, but it would then have been totally defective without a further statement showing that they had performed it, or, as before mentioned, had legally obligated themselves to perform it. It is error to render a judgment upon a defective complaint. The judgment of the court is a conclusion of law from the facts contained in the whole record, and if that discloses a complaint radically defective, the plaintiff is not entitled to any judgment. Gould, Pl. p. 459, § 3.

Upon the view we have taken, the judgment appealed from is not supported by the complaint in the action, and must therefore be reversed. The case will be remanded, and the defendant may apply to the court below for leave to amend his complaint.

(12 Or. 286)

KONIGSBERGER v. HARVEY.

Filed May 19, 1885.

ASSAULT AND BATTERY—PLEADING JUSTIFICATION.

Under the Code practice, in an action for assault and battery, justification must be specially pleaded by defendant.

Appeal from Clackamas county.

F. V. Drake, for appellant.

F. O. McCown, for respondent.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Clackamas. The appellant commenced an action in that court against the respondent and N. Darling to recover damages for an assault and battery alleged to have been committed upon him by said defendants. The defendant Darling was not served with summons, and made no appearance. The complaint was in the ordinary form, and alleged both general and special damages. The respondent filed an answer to the complaint, in which he made the following denials, and in the following form:

"Denies that this defendant, with force or arms, or otherwise, violently or otherwise, assaulted or struck or beat or bruised or wounded the plaintiff about the head or shoulders or back, or elsewhere, with his clenched fists, or with a heavy iron shovel, or otherwise, or until he became insensible, without cause or provocation, or with intent to injure, hurt, or damage the plaintiff."

The remaining denials were to the injury and damages alleged in the complaint. The answer contained no other defense. The action was tried by jury, and the bill of exceptions shows that evidence was given on the part of the plaintiff tending to prove that the respondent assaulted and beat him, and the extent of the injury and damages suffered in consequence thereof. Upon the part of the respondent, it was testified that the appellant made the first assault. After the evidence closed, and the court had instructed the jury generally as to the law in the case, the appellant's counsel asked that the following instruction be given, viz.:

"The jury are instructed that the defendant, Harvey, has not pleaded any facts in justification of injuries to plaintiff. If you find, therefore, that defendant, Harvey, did injure the plaintiff, you must find a verdict for the plaintiff against defendant. Harvey, in such sum as Konigsberger is shown to have suffered by such injury."

This instruction and another covering the same grounds, but more direct and certain, which the appellant's counsel requested to be given, were refused by the court, and an exception allowed to the ruling. The jury returned a verdict for the respondent. The judgment against the appellant was entered, from which the appeal is brought, and the refusal to charge as requested assigned as error, which raises the only point in the case. The answer, in legal effect, merely controverts the assault and beating without cause and provocation, or with intent to injure, hurt, and damage the plaintiff. Strictly con-

strued, it tendered no issue to the cause of action alleged in the complaint. It admits really that the respondent beat the appellant, but denies that it was without cause or provocation, or with intent to injure, etc. The respondent's attorneys very probably supposed that by denying the wrong they would be admitted to justify the act. But parties cannot justify in that way. It does not present the facts upon which justification is claimed—does not show why the beating was not wrongful. The facts must be averred in such cases constituting the justification, and in such a manner that the court can judge that the party was not in the wrong. The party's assertion that the act was not wrongful is no fact; and that is all the denial amounts to. They doubtless fell into the error in consequence of a misapprehension of the effect of the adoption of the Civil Code. It is too often regarded as an original system of practice and pleadings, when in fact it is more a change of the form of an existing system.

The case at bar may serve as an illustration. The appellant alleges that the respondent assaulted and beat him; the respondent claims that what he did was in attempting to repel an assault made by the appellant. He is not able, truthfully, to deny that he did beat and strike the appellant, but claims to be able to prove that the appellant made the first assault, and that he only acted in self-defense. The law upon that subject is the same as it was 500 years ago. The right of self-defense is a natural right, inherent in mankind, though the mode of presenting the defense has been changed somewhat. Under the practice that formerly prevailed, it would have been presented by a plea of *son assault demesne*, in which the facts would have been stated with much formality and great precision. The Code has dispensed with a good deal of the formality, but requires the facts which constitute the defense to be set forth in the form of an answer, under the head of new matter. It is new, because it is not embraced in the statement of facts made by the appellant in his complaint. Pom. Rem. § 691. The reason why the facts constituting such a defense are required to be set forth in some form, is the same now as it was when pleadings were first devised. It is in order to apprise the opposite party of what he must be prepared to confront, so that he will not be taken by surprise.

In *Watson v. Christie*, 2 Bos. & P. 223, decided nearly a century ago, the same principle was recognized. That was a case of trespass for assaulting and beating the plaintiff. The defendant pleaded not guilty. At the trial it appeared that the defendant was the captain of a ship, and the plaintiff was one of his crew. After the proof was made of the beating, the defendant offered to show that it was given by way of punishment for misbehavior on board the ship, and it was insisted that the conduct of the defendant at the time of the assault, being necessarily in evidence, proved that misbehavior; but Lord ELDON, C. J., before whom the cause was tried, directed the jury that the only questions for their consideration were, whether the defendant

was guilty of the beating, and what damages the plaintiff had sustained in consequence of it; that although the beating in question, however severe, might possibly be justified on the ground of the necessity of maintaining discipline on board the ship, yet that such defense could not be resorted to unless put upon the record in the shape of a special justification; that the defendant had not said on the record that this was discipline, or justified it on any ground. I cite this case on account of its analogy to the one under consideration, and because it is referred to in the late revision of Estee's Pleadings, as authority that justification has still to be specially pleaded. The decisions of courts uniformly sustain this view, and it results therefrom that the instruction requested by the appellant's counsel should have been given.

The judgment must therefore be reversed, and the case be remanded for a new trial. The respondent should have leave to file an amended answer conforming to the views here indicated.

(12 Or. 297)

STATE v. LAWRENCE.

Filed May 20, 1885.

1. CONSTITUTIONAL LAW—GRAND JURY—OREGON STATUTE.

The act of the legislature of Oregon providing that the sheriff and clerk shall draw from the body of jurors a grand jury several days prior to the term of court, is in conflict with section 18 of the constitution, and void.

2. SAME—INDICTMENT.

An indictment found by a grand jury organized under an unconstitutional law should be quashed, and a judgment of conviction founded thereon, reversed.

Appeal from Multnomah county.

James K. Kelly, for appellant.

John M. Gearin, Dist. Atty., for respondent.

LORD, J. By the late act of the legislature it is provided, in substance, that the sheriff and clerk shall draw from the body of jurors a grand jury several days prior to the term of court.

The question presented is, does the act conflict with section 18 of the constitution, which provides that "the legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors, and out of the whole number in attendance at court seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment; but the legislative assembly may modify or abolish grand juries?" As the act necessarily selects the grand jury, not from the "jurors in attendance at the court," it is admitted to be in conflict with the provision cited, unless the power vested in the legislature by the latter clause—"may modify or abolish grand juries"—gives validity to the act. What is meant by the words "may modify * * * grand juries?" In a general sense, to modify means to change or vary,—to qualify or reduce; and unless there is something in the context, or special usage, the words

are to be taken in their plain, ordinary, and popular sense. A power given to modify or abolish implies the existence of the subject-matter to be modified or abolished. When exercised to modify, it does not destroy identity, but effects some change or qualification in form or qualities, powers or duties, purposes or objects, of the subject-matter to be modified, without touching the mode of creation. The word implies no power to create or to bring into existence, but only the power to change or vary in some particular an already created or legally existing thing. For the existence of a grand jury the constitution has provided: it must be chosen from the whole number of jurors in attendance at the court. It is this body, as thus constituted, the legislature may modify or abolish. If the power is not put forth to abolish, it may be exercised to modify it; but this cannot include the power to create or destroy it. The fact that it may be abolished or modified, proceeds from the assumption that its existence is already provided for, and furnishes the subject-matter upon which the legislative act is to operate.

It is to grand juries to which the word "modify" in the section relates, and to which the power it embodies must be applied, and not to the mode of selecting grand jurors, for which the constitution has provided; or, perhaps, to the grand jury system, and not to the mode of selecting individual grand jurors who compose the grand jury. These or this the legislature may modify in various ways, by limiting or regulating their powers, duties, qualifications, etc. The constitution, then, having prescribed that the grand jury shall be chosen from the jurors in attendance at the court, it would seem to be exclusive, and limit the legislative power in this regard. "Our act of assembly," said GIBSON, C. J., "requires talesmen to be taken from the by-standers; and in this respect it is more explicit than the English statute, which directs them to be taken from *the persons attending at the assizes*. Yet the construction of one and the other has never been so liberal as to include any but those actually present." *Philips v. Grutz*, 2 Pen. & W. 417.

In *Randall v. State*, 16 Wis. 340, the court says: "It would be absurd to say that a member was in attendance upon the general assembly when it was not convened." The act of the legislature prescribing that the grand jury shall be drawn from jurors other than those in attendance at court, is in conflict with the provision of the constitution cited, and must yield to the paramount law. It is therefore void.

The next inquiry is whether the effect of this is to entitle the defendant to have the indictment quashed, and the judgment of conviction reversed. Although this question was not argued, it was evidently assumed as a consequence of the declared invalidity of the law. The press of other business, and the necessity of an early decision of this matter on account of the public exigency, has denied us that opportunity for an investigation and consideration of this phase of the

question which is desirable and necessary for a satisfactory solution. The proceeding here is direct and not collateral. The defendant was indicted by a grand jury chosen under a void law, to which he regularly excepted, and, as a consequence thereof, claims that the accusatory paper found against him by such a body of men is not an indictment, and that the judgment of conviction founded upon it cannot be sustained. In *People v. Petrea*, 92 N. Y. 135, the defendant was indicted by a grand jury selected under a void law. At the trial he filed a plea alleging the act to be unconstitutional, on the ground that it was a local act. The court declared the act to be void, but held that the objection to it was properly overruled in the court below, as it involved no constitutional right. The court say:

"We are of the opinion that no constitutional right of the defendant was invaded by holding him to answer to the indictment. The grand jury, although not selected in pursuance of a valid law, were selected under color of law, and semblance of legal authority. The defendant, in fact, enjoyed all the protection which he would have had if the jurors had been selected and drawn pursuant to the General Statutes. Nothing could well be more unsubstantial than the alleged right asserted by the defendant, under the circumstances of the case. He was entitled to have an indictment found by a grand jury before being put on his trial. An indictment was found by a body drawn, summoned, and sworn as a grand jury before a competent court, and composed of good and lawful men. This, we think, fulfilled the constitutional guaranty. The jury which found the indictment was a *de facto* jury, selected and organized under the forms of law. The defect in its constitution, owing to the invalidity of the law of 1881, affected no substantial right of the defendant. We confine our decision on this point to the case presented by the record, and hold that an indictment found by a jury of good and lawful men, selected and drawn as a grand jury under color of law, and recognized by the court, and sworn as a grand jury, is a good indictment by a grand jury, within the sense of the constitution, although the law under which the selection was made is void."

But it is to be noted that the constitution of New York does not, as the constitution of Oregon, require the grand jury to be chosen from the jurors in attendance at the court, but the whole matter of selecting a grand jury is left almost entirely to the discretion of the legislature, without limitation or reservation. The court say, "the constitution does not define the mode of selection." With us, so long as the grand jury system is permitted to remain,—not abolished,—it is the constitutional right of a defendant accused of a crime to demand that the indictment shall be found by a grand jury selected only as provided in the constitution. The difference is that here there is a want of power in the legislature to do what was proposed by the act; but there, it was not a want of power to do what was proposed by the act only to make it constitutional: it must be done by a general and not by a private or local law. It was because the act did not invade any constitutional right or privilege of the defendant in the selection of grand juries in that case, to which the result is attributable; it is because it does invade such right in this case that the decision is inapplicable.

There are, however, numerous authorities to the effect that when a grand jury is not selected as required by law, or a selection is made of such persons as are not qualified to act as grand jurors, an indictment found by them is null and void, and should be quashed, and the prisoner indicted *de novo*. *Finley v. State*, 61 Ala. 201; *Couch v. State*, 63 Ala. 163; *Clare v. State*, 30 Md. 165; *Wilburn v. State*, 21 Ark. 201; *Whitehead v. Com.* 19 Grat. 640; *McQuillen v. State*, 8 Smedes & M. 587; *State v. Williams*, 5 Port. 130; *Dutell v. State*, 4 Greene, 125; *Doyle v. State*, 17 Ohio, 222; *Fitzgerald v. State*, 4 Wis. 398.

In *State v. Symonds*, 36 Me. 132, the court say:

"These persons were sworn and charged as grand jurors, and added to the panel, and acted in finding this bill. But as their selection for this purpose was not in conformity to the laws of this state, they constituted no part of a legal grand jury. Consequently the indictment could not have been found by at least twelve lawful jurors, and is void and erroneous at common law; and in the spirit and language of an act of parliament—11 Hen. N. C. 9—should be 'revoked and forever holden for naught.'" 2 Hale, P. C. 155; 4 Bl. Comm. 302; *Com. v. Smith*, 9 Mass. 107; *Low's Case*, 4 Me. 439.

Upon the whole, it is our judgment that the accusatory paper was not an indictment; that it proceeded from and was the act of a body of men selected as a grand jury in violation of the constitution. It follows, therefore, that the judgment of conviction must be reversed, and the cause be remanded for such further proceedings in conformity with this opinion and the law as may be required.

SUPREME COURT OF CALIFORNIA.

(2 Cal. Unrep. 480)

SAWYER v. SARGENT. (No. 9,840.)

Filed May 28, 1885.

LANDLORD AND TENANT—ADVERSE POSSESSION BY TENANT.

A tenant is estopped to deny his landlord's title, and such estoppel continues, not to the end of his term merely, but to the end of his possession; or, where there has been a repudiation of the tenancy, and a subsequent adverse holding by the tenant, until the statute of limitations has run in his favor; and such an adverse possession cannot be set up without a surrender of possession as tenant.

Department 1. Appeal from the superior court of San Diego county.

Works & Titus, for appellant.

Wm. M. Smith, for respondent.

Ross, J. The court below found, and there was evidence sufficient to sustain the finding, that the defendant entered into possession of the demanded premises under a written lease from the plaintiff and one Thomas, and that prior to the commencement of this action, which is ejectment, the term of the lease expired. There is nothing in the case to take it out of the general rule that a tenant cannot dispute his landlord's title. The estoppel, as said in *Tewksbury v. Magraff*, 33 Cal. 244, "continues, not to the end of the term merely, but to the end of the tenant's occupation; or, where there has been a repudiation of the tenancy, and a subsequent adverse holding by the tenant, until the statute of limitations has run in his favor. He cannot set up an adverse title which he may have acquired. Before he can avail himself of such a title he must surrender the possession."

It is not necessary to determine other questions discussed by counsel.

Judgment and orders affirmed.

We concur: McKee, J.; McKinstry, J.

(2 Cal. Unrep. 481)

HITE GOLD QUARTZ CO. v. STERMONT SILVER MIN. CO. (No. 8,746.)

Filed May 28, 1885.

JUDGMENT AFFIRMED.

Appellant having failed to file points and authorities within the time allowed, judgment affirmed.

Department 1. Appeal from the superior court of Mariposa county.

L. F. Jones, for respondent.

W. H. L. Barnes, for appellant.

By THE COURT. It appearing that appellant has failed to file points and authorities within the time granted for that purpose, it is ordered that the order appealed from be affirmed.

(67 Cal. 69)

MULLEN v. HUNT, Judge, etc. (No. 9,998.)

Filed May 25, 1885.

JUSTICE'S COURT—APPEAL—BONDS—DEPOSIT.

On an appeal from a justice's court, the appellant, by making the deposit provided for by statute, (Code Civil Proc. § 978,) may perfect his appeal, such deposit being allowed in lieu of an appeal-bond. If the appellant, after making the deposit, voluntarily withdraws the same, and after the time allowed by statute files an appeal-bond, the appeal will be deemed abandoned.

In bank. Application for writ of prohibition.

John J. Coffey and W. H. Tompkins, for petitioner.

P. J. Van Loben Sels, for respondent.

MORRISON, C. J. This is a petition for a writ of prohibition to prevent the respondent from trying a certain cause pending in his court. The facts upon which the petitioner relies may be briefly stated as follows: The petitioner recovered a judgment in a justice's court, in the city of San Francisco, against one John F. Revalk, in the sum of \$50, and \$33.50 costs, on the twenty-second day of September, 1884. On the twenty-ninth day of the same month, a notice of appeal and an undertaking in due form were filed in said action. On the second day of October a notice of exception to appellant's sureties was duly given and filed, and on the fourth day of October a notice of justification of the sureties on the appeal was duly given, but the sureties failed to appear and justify according to law; but on the seventh day of October the defendant deposited in the justice's court the sum of \$100,—a sum equal to double the amount of the judgment,—and the further sum of \$83.50, in gold coin, in lieu of an undertaking on appeal.

It is claimed by the petitioner that there is no law authorizing such a deposit. But in this counsel is mistaken, as there is a section of the Code authorizing such deposit in the place of an undertaking. Section 978, Code Civil Proc., provides that a deposit of the amount of the judgment, including costs, with the justice or judge, is equivalent to the filing of the undertaking; and in such case the justice or judge must transmit the money to the clerk of the superior court, to be by him paid out on the order of the court. When the money was deposited in the justice's court, it should have been transmitted to the clerk of the superior court, as a security on appeal, and it took the place of an undertaking. But pending the appeal the money was withdrawn by the appellant, and an undertaking filed in lieu thereof. This undertaking was filed after the time allowed by the statute for the filing thereof, and, in our opinion, was filed without any law authorizing it. It is true, it was done by an order of the court, but the court had no power to make an order which in effect extended the time for filing an undertaking on appeal beyond the 30 days fixed by the Code. The undertaking thus filed may be left out of the case, and we find an attempted appeal without any security

for judgment or costs. It was the voluntary act of the appellant in withdrawing the deposit, and we think he thereby abandoned his appeal.

It follows, from the foregoing reasoning, that there was no appeal pending in the superior court after the withdrawal of the deposit, and no case for that court to try. It was, therefore, without jurisdiction in the case, and the motion to dismiss the appeal should have been granted. The order made on the seventh day of March, 1885, in response to said motion to dismiss, allowing the appellant to file another undertaking on appeal, was without authority of law and void.

Writ ordered as prayed for.

We concur: MCKEE, J.; MCKINSTY, J.; ROSS, J.; SHARPSTEIN, J.; MYRICK, J.; THORNTON, J.

(67 Cal. 67)

SOUTHERN PAC. R. CO. v. MCCUSKER. (No. 8,333.)

Filed May 25, 1885.

UNITED STATES GRANTS—SWAMP LANDS—EVIDENCE.

It is competent for the defendant, in an action to quiet title based on a patent which purports to have been issued in pursuance of a congressional grant to the Southern Pacific Railroad Company, to show that the land included in it was swamp and overflowed land, and that it was therefore excepted from the congressional grant.

Department 1. Appeal from the superior court of the county of Monterey.

A. S. Kittredge, for appellant.

John A. Wright and Wright & Cormac, for respondent.

Ross, J. If, in an action of ejectment based on a patent purporting to have been issued in pursuance of the grant by congress to the railroad company, it is competent for the defendant to attack the validity of the patent on the ground that the land embraced in it was included within the exterior limits of a tract of land claimed as a Mexican grant, and therefore excepted from the congressional grant, as was held by a majority of this court in *McLaughlin v. Heid*, 63 Cal. 208, it is competent, in an action to quiet title based on a similar patent, for the defendant to show that the land included in it was swamp and overflowed land, and therefore excepted from the congressional grant. In the case at bar it was admitted by the respective parties that over one-half of each governmental subdivision of the land in controversy was and always has been swamp and overflowed land, and thereby rendered unfit for cultivation. The case of *McLaughlin v. Heid* is binding on us, and on the authority of that case we must reverse the judgment and order of the court below.

Judgment and order reversed, and cause remanded for a new trial.

I concur in the judgment: MCKINSTY, J.

I concur: MCKEE, J.

SOUTHERN PAC. R. CO. v. McCUSKER. (No. 8,316.)

Filed May 25, 1885.

Department 1. Appeal from the superior court of Monterey county. The facts in this case are the same as in *Southern Pac. R. Co. v. McCusker*, ante, 122.

Kittredge & Halstead, for appellant.

Hammon & Wright, for respondent.

By THE COURT. On the authority of *Southern Pac. R. Co. v. McCusker*, ante, 122, judgment and order reversed, and cause remanded for a new trial.

(67 Cal. 59)

CALIFORNIA SOUTHERN R. CO. v. SOUTHERN PAC. R. CO. and another.
(No. 9,756.)

Filed May 22, 1885.

1. RAILROAD COMPANIES—PROCEEDINGS, JOINDER OF.

A proceeding to acquire lands for depot purposes, and a proceeding to ascertain compensation for crossing one railroad by another, may be united. A proceeding to acquire a right of way for a railroad across the right of way of another railroad may be united with a proceeding to acquire right of way over the lands of the latter.

2. SAME—PROCEEDING TO CONDEMN LAND—COMPLAINT.

In a proceeding to condemn land for the right of way of a railroad, a complaint which states "the general route," giving the *termini* as National City and "a connection with the Atlantic & Pacific Railroad Company, at or near the thirty-fifth parallel, north latitude, in the state of California," sufficiently complies with the statute. Code Civil Proc. Cal. § 1244.

3. CONSOLIDATION OF COMPANIES—ARTICLES OF INCORPORATION.

Where railroad corporations consolidate, the articles of consolidation constitute the new articles of incorporation, and the persons therein named to act as directors are such until successors are elected. St. Cal. 1861; Civil Code Cal. § 473.

4. SAME—VALUATION OF LANDS—IMPROVEMENTS.

Where proceedings are instituted to condemn certain land for the benefit of a railroad, in determining the compensation to be awarded for the lands taken, the value of ties, rails, etc., already laid, with consent of the owner of the land, are not to be considered as part of such realty.

5. SAME—MANNER OF CROSSING RAILROADS.

Question as to whether crossing one railroad by another in a certain manner is compatible "with the greatest possible public benefit and least private injury" is one of fact, determinable by reference to the proven circumstances in each case.

6. SAME—JURY, DETERMINATION OF ISSUES BY—VERDICT.

In condemnation proceedings the verdict of the jury as to assessment of the value of property to be taken is conclusive, except that a new trial of the question may be allowed by the court. The findings of the jury on other issues made by the pleadings and submitted to them will be considered as adopted by the court if they are recited in the judgment.

7. SAME—JUDGMENT—SIGNATURE BY JUDGE, NECESSITY OF.

It is not necessary to the validity of a judgment that it be signed by the judge; the presumption is that if entered by the clerk, it was so directed and authorized by the judge.

8. SAME—ORDER OF CONDEMNATION—FINAL JUDGMENT.

In condemnation proceedings a judgment based on the assessment of damages, adjudication that the use is public, and the taking necessary, is the final judgment, and an appeal may be taken thereupon. The final order of condemnation is a special order made after such final judgment, and an appeal may be taken therefrom within 60 days from entry; and an appeal, if not so taken, will be dismissed.

9. SAME—ALLEGATION OF VALUE OF LAND IMMATERIAL.

In condemnation proceedings the value of the land sought to be taken need

not be alleged or proved by plaintiff, as for such purposes the value is immaterial.

10. SAME.—FENCING, COST OF, ELEMENT OF DAMAGE.

Where there is no evidence of circumstances existing, making the cost of fencing an element of damage, the statutory provisions which require fencing of a railroad, or payment for fencing, are not to be considered in fixing compensation to be paid for taking land.

Department 1. Appeal from the superior court of the county of San Bernardino.

A. B. Hotchkiss, for appellants.

Byron Waters, for respondent.

BY THE COURT. 1. It is contended by appellants that the court below ought to have sustained the demurrer to plaintiff's complaint, taken on the ground of a misjoinder of causes of action; that a proceeding to ascertain compensation for crossing one railroad by another cannot be united with a proceeding to acquire lands for depot buildings. It is urged that the defendant the Southern Pacific has only an easement; that such easement is not an estate in lands; and that section 1244 of the Code of Civil Procedure only permits *all parcels of land* required for the same public use to be included in the same proceeding. But here the proceeding is to acquire a right of way across the right of way of the defendant railroad company, (which the statutes allow,) and to acquire a right of way over lands of the defendant. In such case an easement is sought to be acquired, as is provided for in the Code of Civil Procedure, § 1239. If the easement is not technically an estate in the land, the acquisition of the right of way involves the taking of a parcel of land, within the meaning of the statute. It has never been doubted that proceedings to condemn two or more parcels for the purpose of the right of way may be united under section 1244, although the result may not be to transfer the fee, or any estate in the lands, but only to impress them with an easement.

2. It is claimed that the complaint is demurrable because it does not appear therefrom that the parties have disagreed as to the value of the property sought to be condemned for the public use. But the fact of disagreement is averred in terms. The complaint also alleges that the two corporations could not agree as to the points or manner of crossing, intersection, and connection.

3. The complaint *does* contain a statement of all owners and claimants of the property as required by the statute.

4. Appellants claim that the complaint does not show the location, general route, and *termini* of the proposed road as required by section 1244, Code Civil Proc. The "general route" is given, and the *termini* are stated to be National City and "a connection with the Atlantic & Pacific Railroad Company, at or near the thirty-fifth parallel of north latitude, in the state of California." In *Callender v. Painesville R. Co.*, 11 Ohio St. 516, it was held that a statement of the *termini* and line of a road in a certificate of incorporation is sufficient if such as

would have been sufficient in a special act of incorporation. An allegation in the complaint as to *termini* is sufficient if it follow the language contained in a valid certificate of incorporation.

5. The cross-complaint was properly stricken out. *California P. R. Co. v. Central P. R. Co.* 47 Cal. 549; *Moyle v. Porter*, 51 Cal. 639.

6. Appellants contend the plaintiff failed to prove that, after the consolidation or amalgamation of the California Southern Railroad Company and the California Southern Extension Railroad Company, a copy of the "new articles of incorporation" was filed in the office of the secretary of state. But a careful reading of section 40 of the law of 1861 (Hittell, Dig. par. 865) and of section 473 of the Civil Code shows that, by the latter as by the former, it was intended that the articles of consolidation—themselves constituting the new articles of incorporation—should be filed. And since the articles of consolidation constitute the new articles of incorporation, the persons named therein to act as directors until their successors shall be elected in the manner to be provided in the by-laws were properly named as directors.

7. There was evidence of consent by defendants to the entry and building of its road by plaintiff on sections of land Nos. 7, 19, 21, and 33, and that the entry of plaintiff and its acts thereon were not trespasses. The value of the ties, rails, etc., were therefore not to be considered as part of the realty in determining the compensation to be awarded for the lands taken. *California P. R. Co. v. Armstrong*, 46 Cal. 90.

8. We think the question as to whether the manner of crossing (on a level with, above or below, the other road) is compatible "with the greatest public benefit and least private injury" is a question of fact, to be determined with reference to the circumstances proved in each case.

9. There was evidence to sustain the findings that the plaintiff and the defendant the Southern Pacific Railroad Company could not agree on the points and manner of the crossing, and could not agree upon the compensation to be made therefor.

10. The title of the Code of Civil Procedure, which treats of Eminent Domain, does not, in express terms, provide for a judgment in condemnation proceedings, unless the "final order of condemnation," mentioned in section 1253, can be called the judgment. Yet, by section 1256, "except as otherwise provided in this title, the provisions of part 2 of the Code are applicable," etc. And section 1241 requires of the court to determine that the taking of particular property is necessary to a use which is public, and the value of such property. So far as the assessment of the value of the property to be taken is concerned, while perhaps a new trial of the question of value may be allowed by the court, the verdict of the jury is conclusive. Const. art. 1, § 14. As to other issues of fact made by the pleadings, the court is

authorized by the Code of Civil Procedure to submit them to a jury. Section 309. The "judgment" recites the findings of the jury, and the same are thus adopted by the court, even if it should be conceded that the findings of the jury were merely advisory. It is urged by appellants that the judgment or decree is not *signed* by the judge, but our attention has not been called to any provision of the Codes which requires any judgment to be signed by the judge. The presumption would be that the judgment entered by the clerk was directed and authorized by the judge. In the present case the presumption is strengthened by the fact that the court subsequently made an order (which is signed by the judge) of "final condemnation," based on a compliance with the judgment, on the part of the plaintiff, by the payment of certain moneys therein determined to be the value of the property to be taken, etc.

11. The judgment based in part on the assessment of damages, and adjudicating that the use is public, and the taking necessary, etc., is the "final judgment" from which an appeal may be taken. The sum of money assessed must be paid within 30 days after "final judgment." Code Civil Proc. § 1251. It may, as suggested, be an inaccurate use of terms to designate as *final* a judgment which the court may set aside, with all the proceedings on which it is based, if the sum of money assessed is not paid. Code Civil Proc. § 1252. And, ordinarily, a judgment is not final when the law contemplates further and subsequent proceedings in the same court to precede the absolute determination of the rights of the parties. But the question is not what is or is not a final judgment, within the appropriate meaning of the terms, but what is intended to be designated as the final judgment in the title treating of Eminent Domain. Reading the sections bearing on the matter together, the final judgment is not the final order of condemnation provided for in section 1253, but is and must be the judgment which adjudges the sum to be paid within 30 days after it is entered. Section 1251.

12. It follows that the "final order of condemnation" must be considered a "special order made after final judgment," from which an appeal must be taken within 60 days after its entry. From the transcript before us it appears the "final order of condemnation" was entered August 6, 1883, and the notice of appeal therefrom was not filed nor served until August 2, 1884. The appeal from the order must be dismissed.

13. Appellants further contend that the decision is against law, in that the value of the property was found by the jury to be less than the value alleged in the complaint; but when the value cannot be agreed upon, it is for a jury (unless waived) to determine the value. The plaintiff is not required to state the value in the complaint. Code Civil Proc. § 1244. The allegation of the complaint as to value is an immaterial and impertinent allegation, which the plaintiff was not required to prove.

14. Appellants claim the judgment appealed from is invalid because of that portion of it which permits the plaintiff, in lieu of paying the value of certain fences to be erected by defendants, to give bond that it will build the fences itself. The claim is that under the constitution (article 1, § 14) compensation must be made in money before appropriation. If the estimated cost of fencing, found by the jury in compliance with the fourth subdivision of section 1248 of the Code of Civil Procedure, is a portion of the compensation to be paid for the private property appropriated to the public use, the objection is well taken.

In *Butte Co. v. Boydston*, 64 Cal. 110, it was held, in a proceeding to condemn a right of way for a public road, that when it appears that the value of the adjoining land will be reduced by running the road through a fenced tract, evidence was admissible to prove the cost of fencing along the road. And here, if it appeared that a necessity for fencing would arise to restore the adjoining land to its value prior to the taking of the right of way, the cost of such fencing might be considered as an element of damage. But the record herein does not show that the circumstances existed which would make the cost of fencing an element of damage; and, as was pointed out in *Butte Co. v. Boydston*, the provisions of the statute which impose on a railroad company the duty of fencing its road, or to pay for fencing, do not affect the question as to the compensation to be paid for taking the land or imposing an easement upon it.

15. If it be conceded that the question asked of the witness Perris, "Is that location and crossing made in a manner most compatible with the greatest public benefit and least private injury?" was objectionable, as "calling for a conclusion," etc., the ruling of the court permitting the question could not have injured the defendants, since the answer of the witness consisted of a statement of facts submitted to the court and jury as tending to prove that the location and crossing were made in such manner as subserved the greatest public benefit and least private injury.

16. The answer denies that the plaintiff is a corporation; and there is no finding upon the issue thus made. Yet, as upon the evidence the court must have found the plaintiff to be a corporation, the omission is not material.

The appeal from the final order of condemnation is dismissed. Judgment and order denying a new trial is affirmed.

CALIFORNIA SOUTHERN R. CO. v. SOUTHERN PAC. R. CO. and another. (No. 9,757.)

Filed May 22, 1885.

Department 1. Appeal from the superior court of San Bernardino county. The facts in this case, and the points involved, were similar to those in *California Southern R. Co. v. Southern Pac. R. Co.*, ante, 123.

A. B. Hotchkiss, for appellants.

Byron Waters, for respondent.

BY THE COURT. On the authority of *California Southern R. Co. v. Southern Pac. R. Co.*, ante, 123, the appeal from final order of condemnation is dismissed, and the judgment and order denying new trial affirmed.

(2 Cal. Unrep. 475)

BRYANT v. BANK OF CALIFORNIA. (No. 7,701.)

Filed May 22, 1885.

1. SUPPLEMENTAL PROCEEDINGS, PROCEDURE ON.

As proceedings supplementary to execution are purely statutory, the mode of procedure thereon provided for by statute must be followed; and a failure to comply with the statute will vitiate the proceedings.

2. SAME—RECORD AS EVIDENCE IN.

A judgment creditor, in a supplementary proceeding against a garnishee, brought in pursuance of an order made under the statute, (Code Civil Proc. Cal. § 720,) must aver and prove the existence of the order and of the proceedings by which the order was founded. The record of such proceedings, to be admissible in such action, must be filed with the clerk of the court, and must come, either as an original or authenticated copy, from the hands of the officer in whose custody it is kept.

Department 1. Appeal from the superior court of the city and county of San Francisco.

Wilson & Wilson, for appellant.

L. E. Bulkely, for respondent.

McKee, J. On the first of May, 1877, the plaintiff, A. S. Bryant, recovered a money judgment, by confession, against J. M. Quimble, upon which an execution was issued, and put in the hands of the sheriff of the city and county of San Francisco for collection, according to law. While the execution was in the hands of the officer, unlevied and unsatisfied, in whole or in part, Bryant claims to have commenced proceedings, supplementary to execution, for the examination of the judgment debtor as to his property, and against A. J. Ralston, William Sharon, Thomas Brown, and D. O. Mills as garnishees, which resulted, as it is alleged in the judicial order authorizing the institution of a suit against A. J. Ralston and the Bank of California, garnishees, for the recovery of certain moneys which, as it is claimed the testimony of the garnishees discloses, were deposited with the Bank of California by the judgment debtor in the year 1876; and it is by virtue of that alleged order that the plaintiff commenced the action in hand.

The complaint contains specific averments of proceedings, supplementary to execution, in the case of *Bryant v. Quimble*. Issue was taken upon it, by specific denials of each of its averments. On the trial the plaintiff, for the purpose of proving compliance with the law

under which the alleged supplemental proceedings were taken, and which resulted in the order authorizing the institution of the suit, offered in evidence the papers constituting the proceedings. These consisted of certain affidavits, made by the attorney for Bryant, (the orders thereon purporting to have been signed by the judge of the court,) for the examination of the judgment debtor and of the other persons named as garnishees, certain papers purporting to contain the testimony of the judgment debtor and garnishees, taken pursuant to said orders, and the final order, predicated upon that testimony, purporting to have been signed by the judge of the court, authorizing the plaintiff to sue. Each of these papers was entitled in the case of *Bryant v. Quimbie*; but to each and all of them, when offered in evidence, the defendant objected, on the grounds that they constituted no part of the record of the case of *Bryant v. Quimbie*, and did not come from the files of the court, but came from the custody of the attorney for the plaintiff, and that they were incompetent, irrelevant, and immaterial. The objections were overruled; and the ruling is assigned as error.

As matter of fact, not one of the papers offered in evidence was indorsed filed, nor does the record show that any of them were produced from the custody of the clerk of the court in which the order authorizing the suit purports to have been rendered. Affirmatively, it does appear that they all came from the custody of the attorney of the plaintiff; and, assuming that the judgment debtor, as defendant in the original action, had notice of the proceedings in the action supplementary to execution, in which an order was made which operated in law to transfer his interest in certain property for the satisfaction of the judgment, the question arises, had the judge of the court, upon the papers in evidence, jurisdiction to make the order?

It may be conceded that an order, made under section 720, Code Civil Proc., authorizing a suit to be brought against a garnishee, cannot be questioned for any irregularity in the proceeding, and that, if made in the exercise of a proper jurisdiction, put in motion according to law, it is conclusive in a suit brought in pursuance of it; but, as it is by virtue of the order that the suit is instituted, it is incumbent on the plaintiff in the suit to aver and prove the existence of the order, and of the proceedings upon which the order was founded. 1 Greenl. Ev. § 511. Without the proceedings the order would be a nullity, and without the order the action could not be maintained. It is the order which, as the legal result of the proceedings, operates as a judicial assignment to the judgment creditor of the right or interest of the judgment debtor to the property in the hands or subject to the control of the garnishee; and to produce that legal effect the proceedings must have been taken, and the order made, within the jurisdiction of the court before whom they purport to have been taken, and by whom the order purports to have been made. If the court had no jurisdiction of the proceedings, it had no jurisdiction to make

the order. To the validity of all judicial proceedings, jurisdiction is indispensable.

Now, a proceeding supplementary to execution is entirely statutory. *Hassie v. G. I. W. U. Cong.* 35 Cal. 378. It is a separate proceeding in an original action, in which the court where the action is pending, is called upon to exercise its jurisdiction in aid of the judgment in the action; and, as the statute which gives the remedy prescribes the mode of procedure, the mode must be followed. Unless the requirements of the statute are complied with, the proceeding cannot be sustained. *McDonald v. Vinette*, 58 Wis. 620; S. C. 17 N. W. Rep. 319; *Demeritt v. Estes*, 56 N. H. 315; *Bloom v. Burdick*, 1 Hill, 130; *People v. Spencer*, 55 N. Y. 4; *Bryan v. Smith*, 10 Mich. 229; *Ransom v. Williams*, 2 Wall. 313.

Sections 715 and 717, Code Civil Proc., provide that supplementary proceedings shall be commenced by affidavits, which must contain the requirements of the section of the Code under which they are made. Such an affidavit takes the place of a creditors' bill in chancery, (*Adams v. Hackett*, 7 Cal. 201; *McCullough v. Clark*, 41 Cal. 298; *Pacific Bank v. Robinson*, 57 Cal. 520;) and, as the legal substitute for that procedure, it must not only contain the necessary averments to give the court jurisdiction over it, but it must also be filed in the court, or delivered to the clerk for that purpose. Until the proceeding is thus commenced, it has no legal existence to set in motion the jurisdiction of the court to make the necessary orders for the examination of the judgment debtor or garnishee in aid of the judgment; there is nothing upon which the judge of the court can judicially act.

It is the proceeding, from its initial point in the making and filing of the requisite affidavit until its final completion in the judicial order for the institution of a suit against the garnishee, which becomes a judicial record as to the matter in question, (section 1904, Code Civil Proc. ;) and, as such, it must be filed with the clerk of the court, and be lodged in the custody of the court; and, to be admissible as evidence of a judicial order, it must come from the hands of the officer in whose custody it is kept as a record of the court, either as an original or authenticated record. Section 1905, *supra*. "Nothing can be borrowed *ex visceribus judicii* until the original is proved to have come from the proper court." 1 Greenl. § 508.

The papers offered, and admitted in evidence over the defendant's objections, were not a record. They were not original papers filed in the cause in which the proceeding purports to have been taken; they were not found in the place where such a record is kept, nor were they in any way authenticated as a record of the court. Hence jurisdiction to make the orders purporting to have been made for the examination of the judgment debtor, and of the alleged garnishees, as to the property of the judgment debtor did not attach; and the proceeding and orders made, including that which authorized the institution of the action in hand, were void. *Day v. Brosnan*, 6 Abb. (N. S.) 312.

Being void, the defendant in this action was not bound to move to vacate the order; it was as though it had never been made; and it attained no validity by reason of the omission of any one, against whom it might be operative if valid, to vacate or set it aside. Nor was there any record upon which any party aggrieved could appeal. The ruling of the court in admitting the papers in evidence was therefore erroneous.

Judgment and order reversed, and cause remanded for further proceedings.

Ross, J. Inasmuch as no notice to the judgment debtor of the proceeding authorized by section 720 of the Code of Civil Procedure is provided for, I am of opinion that that section which purports to authorize the judge, by order, to permit the judgment creditor to institute and maintain an action against the alleged debtor of the judgment debtor is unconstitutional and void. This, not only for the protection of the rights of the judgment debtor, but also for the protection of those of his alleged debtor, who might otherwise be compelled to pay twice. For this reason, I concur in the judgment.

I concur: MCKINSTRY, J.

(67 Cal. 71)

SCOTT v. SIERRA LUMBER CO. (No. 8,775.)

Filed May 25, 1885.

1. TRUST—POWER TO SELL—EFFECT OF PURCHASE FOR TRUSTEES.

Trustees authorized by the trust deed to sell, in case of a certain default, at public auction for gold coin or cash, cannot sell to a third person, who, at the request of and for the trustees, bid in the property on the distinct understanding that he was not to pay any money or take any interest in the property otherwise than in trust for the trustees; and such a sale would be fraudulent, and set aside as such.

2. APPEAL—EVIDENCE—OBJECTION, WHEN MAY BE TAKEN.

An objection cannot be taken for the first time in the supreme court to evidence introduced without objection by the adverse party on the trial in the court below.

In bank. Appeal from the superior court of the county of Sacramento.

Cope & Boyd, for appellant.

E. B. Mastick and *C. A. Garter*, for respondent.

MCKINSTRY, J. The power contained in the deed of trust, recited in the complaint and findings, empowered the trustees, in case of certain default, to sell at public auction for "gold coin" or cash. The court below found that the trustees offered the real and personal property (except two lots in Red Bluff) for sale, "and struck off the same to the plaintiff, who, at their request, and for them, bid the sum of fifty thousand dollars, upon the distinct understanding that he was not to pay any money, or take or have any interest in the property, otherwise than in trust for them." It is said by appellant there was

no evidence to sustain the foregoing finding. But there was evidence that the plaintiff bid off the property, at the request of the trustees, with the understanding that he should pay nothing, and that in fact he paid nothing. It is suggested the pretended purchase was not made "for" the trustees, but for the creditors. There was evidence tending to prove that *some* of the creditors assented to a proposition that a sale should take place, and that the nominal purchaser should hold the legal title in trust for them and other creditors. Even if it should be conceded that the trust could be thus diverted, there was no evidence that all, or a majority in number or amount, of the creditors agreed orally or otherwise to such an arrangement. There can be little doubt that a pretended purchase made at the request of the trustees, and with the understanding that the title so acquired should be subject to their direction, was made for the trustees. There was evidence to uphold this view of the facts.

The defendant in its answer averred that the purchase was made in the name of the plaintiff, but to and for the use of Kraft,—one of the trustees,—and the court found that it was without consideration, and for all the trustees. The finding, although somewhat broader in terms, is no broader in legal effect than the allegation of the answer. It would seem to be unnecessary to argue that a power to sell at auction for cash did not authorize the trustees to convey the legal title to a third person without consideration. It is said, however, that the creditors only could complain of the manner of the sale. But the instrument of trust provides that, after payment of the debts due to the creditors and certain expenses, the balance or surplus of the proceeds of the sale for cash "shall be paid to the parties of the first part, their heirs or assigns." Thus Campbell & Welton and their assigns were interested in the due execution of the power of sale, not only as grantors of the legal estate and donors of the special power, but also as contingent beneficiaries. Neither Campbell nor Welton, nor any of their assigns, agreed to surrender their interest in the estate, or its proceeds, and to receive therefor a claim against the trustees, as such, or in their individual capacities; if, indeed, the transaction with respect to the sale can be held to have been intended to create such liability.

It is said the deed from the trustees conveyed the legal title, on which plaintiff can recover the possession at law; and we are asked to treat the present as an action at law, combining the actions known among us as "ejectment" and "claim and delivery" of personal property.

The court below found that the trustees never received possession of any of the real or personal property described in the complaint, but that Campbell & Welton delivered possession of all the property to the Sierra Flume & Lumber Company, to whom the same was sold for a valuable consideration,—\$275,000. An allegation of the complaint is:

"Campbell & Welton sold all the property (excepting lots 13 and 14, in block No. 13, in the town of Red Bluff) to the Sierra Flume & Lumber Company * * * for the price of \$275,000, out of which said Sierra Flume & Lumber Company retained the amount of said promissory note," etc.

This is a very clear admission and statement that the Sierra Flume & Lumber Company were purchasers for value. There is no finding that the Sierra Flume & Lumber Company, or the trustees in bankruptcy, or defendant, had actual notice of the transfer of the personal property to the trustees. The record of the deed of trust operated no constructive notice of the transfer of *personal* property. It may be conceded that the general power of the trustees to sell and convey was co-extensive with their legal ownership, and that such power was entirely distinct from the special power to sell contained in the deed, and, as a consequence, that the deed to plaintiff passed the naked legal title to the lands therein described. There can be no doubt, however, that if plaintiff had commenced an action of ejectment, the defendant could have filed a cross-complaint, praying that the sale and conveyance to plaintiff be set aside.

But the present suit cannot be upheld as an action at law for the recovery of the possession of the real property. Even if the averment of probative facts as to the transfer of the legal title to the real estate could be held to be sufficient in the action here known as "ejectment," plaintiff has not contented himself with alleging a transfer by deed of the legal title to the trustees, and from the trustees to himself, but has averred an exact execution of the special power of sale set forth in the deed of trust. Thus the plaintiff tendered an issue as to the due execution of the special power—an issue which, as claimed by appellant, could not have been tried in an action at law; an issue proper to be determined in a court of equity. It is urged by appellant that the allegation of the complaint that the sale was at public auction, to the highest bidder, *for cash*, is not denied by the answer. But the answer denies that the trustees had power to make the sale, and alleges that the purchase was for the trustees. The testimony that the sale was not for cash, nor as required by the special power, was admitted without objection on the part of the plaintiff. Had objection to the testimony been taken in the court below, the answer might have been amended so as to render it strictly admissible. *Stringer v. Davis*, 30 Cal. 318; *Clark v. Phoenix Ins. Co.* 36 Cal. 175. But a party cannot, for the first time, in this court object, on any ground, to evidence which was introduced by the adverse party at the trial in the court below without objection made thereto. *Bliss v. Ellsworth*, 36 Cal. 310. Where evidence is not objected to in the court below, because not admissible under the averments of the answer, it is too late to raise the objection in the supreme court. *Hutchings v. Castle*, 48 Cal. 152; *Henry v. Southern Pac. R. Co.* 50 Cal. 176.

The issue tendered by the plaintiff was, in fact, tried, and the case

is here to be treated, as if the answer had specifically denied that the sale was at public auction, or to the highest bidder, for cash. This equitable issue having been, in effect, made and tried, defendant ought not to be deprived of the benefit of a finding in its favor—as to the execution of the special power of sale, and the validity of the conveyance based upon the sale—merely because of its omission to *pray* that the sale be set aside and the conveyance annulled. But not only do the averments as to the due execution of the special power and the counter-statement of defendant present an issue of fact to be tried appropriately only in a court of equity, but the whole tenor of the complaint indicates a purpose to resort to the court as a court of equity. The complaint concludes with the general prayer “for such other and further relief as the equity of the case may warrant.” Instead of the brief and comprehensive averments held to be sufficient in the action at law, the complaint contains a long recital of probative facts, many of which would have no place in the evidence, treating the action as simply one at law, and including statements of special equities upon which was based an application for the appointment of a receiver. A receiver was, in fact, appointed by the court below. A receiver cannot be legally appointed in an action of ejectment. *Bateman v. Superior Court*, 54 Cal. 285.

Plaintiff selected his forum, and, having appealed to a court of equity, was not entitled to have that court try an ejectment, even if his bill should have been dismissed on the ground that he had a complete remedy at law. But he asked for appropriate decree in equity, and if he had got all implied by his allegations and prayer, the sale under the special power would have been *validated*. Even if we would be justified in any case in culling separated allegations from a complaint purporting to be an application to the equity side of the superior court, and, disregarding all other portions of the pleadings, in uniting such separated allegations, and creating out of them a sufficient complaint at law, we would not be justified in doing so for the purpose of maintaining a technical right to the possession on the part of the holder of the naked legal title, acquired under a sale found (upon an issue actually made) to have been a violation of the trust.

In the view we have taken it is not necessary to consider the effect of the releases introduced by defendant.

The judgment and order denying a new trial are affirmed.

We concur: SHARPSTEIN, J.; MYRICK, J.; ROSS, J.

'87 Cal. 65)

POWERS v. CRANE. (No. 9,841.)

Filed May 25, 1885.

FORECLOSURE OF CHATTEL MORTGAGE—APPEAL-BOND, EFFECT TO STAY EXECUTION.

The statutory undertaking of \$300, given on an appeal from a judgment of foreclosure of a chattel mortgage, will operate as a stay of execution; and if, for the purposes of staying execution, the appellant gives another undertaking, it is without consideration, and cannot be enforced against the sureties thereon.

Department 1. Application for peremptory *mandamus*.

The petitioner here recovered judgment against Johnson & Wyman in the lower court for foreclosure and sale of certain newspaper property mortgaged to secure the debt for which judgment was rendered. A new trial having been denied, Johnson & Wyman appealed, perfecting their appeal by an undertaking in \$300, and an undertaking in the sum of the judgment. The judgment was affirmed, *remittitur* issued and filed below, and an order of sale issued thereon. On sale of the property, after payment of costs, \$80 was left to be applied to the judgment. The balance of the judgment was docketed against Johnson & Wyman. Application was then made for judgment against the sureties according to the condition of the undertaking. The application was refused.

Edward Lynch, for petitioner.

B. McFadden and Flournoy, Mhoon & Flournoy, for respondent.

Ross, J. The petitioner's counsel states that if the undertaking given to stay execution in the action entitled *Johnson v. Powers* was not binding upon the sureties thereon, it would be idle to compel the respondent by *mandamus* to act upon the petitioner's motion. In this respect we agree with petitioner, and therefore inquire whether the undertaking is binding upon the sureties. *Johnson v. Powers* was an action in which, by cross-complaint, the defendant therein sought the foreclosure of a chattel mortgage. The court, by its decree, ascertained the amount due from the plaintiff to the defendant, and ordered a sale of the mortgaged property to pay the amount, with the usual provision in regard to the payment of costs, commissions, etc., and directing that in the event the proceeds of the sale be insufficient to pay the mortgage debt, that a judgment be docketed against the plaintiff in defendant's favor for such deficiency. From that judgment the plaintiff appealed, and, for the purpose of staying execution of the judgment, gave, in addition to the statutory undertaking of \$300, an undertaking in double the amount of the sum ascertained by the decree to be due from the plaintiff to the defendant. On appeal the judgment was affirmed, and upon the going down of the *remittitur* the defendant's costs of appeal were paid to him, and an order of sale issued, under which the property was sold; and, having realized but a trifle of the amount of the mortgage debt, the defendant, who is the petitioner here, sought by motion in the court below

to have judgment entered against the sureties on the undertaking for the amount of the deficiency.

On behalf of the sureties, who are the real parties in interest here, it is claimed that the undertaking, except in so far as the \$300 is concerned, and about which no question arises, was without consideration and void. The pretended consideration therefor was a stay of execution of the decree appealed from. And if the law itself operated a stay upon the giving of the \$300 bond, it would seem that the point is well taken. That the statute did so operate was held by this court in the case of *Snow v. Holmes*, 64 Cal. 232. As the statute itself wrought the stay, there was no consideration for the sureties' promise. The benefit which the plaintiff in the case of *Johnson v. Powers* secured from the appeal, came from the statute and not from the promise of the sureties. Hence what is said in *Hathaway v. Davis*, 33 Cal. 169, is not applicable.

Writ denied.

We concur: McKINSTRY, J.; McKEE, J.

(67 Cal. 79)

NIDEVER v. HALL. (No. 8,343.)

Filed May 28, 1885.

SLANDER—ACTIONABLE WORDS, PROOF OF.

In slander for words not actionable *per se*, the plaintiff may prove the existence of some extraneous facts which make the words spoken actionable *per se*, and under the general issue plaintiff may have the right to disprove such facts. The plaintiff must aver and prove that the words were actually used in their actionable sense, and were applied to the plaintiff, and that the hearers so understood them; and the testimony of hearers as to their understanding of the words is admissible on this point.

Department 1. Appeal from the superior court of the county of Monterey.

A. S. Kittredge, A. Craig, and S. F. Gill, for appellant.

H. V. Morehouse, for respondent.

McKEE, J. This is an action of slander. Substantially the charge is that, pending an action for seduction, brought by Barbara M. Hook against James A. Hall, R. F. Hall, the father of the said James A., in the presence of the father of the plaintiff in this case, and in the presence of several other persons, published of and concerning the plaintiff these words: "He [the plaintiff] virtually acknowledged to me that he had sexual intercourse with Barbara M. Hook;" and that by the publication of these words to his father and to the other persons, pending the suit for seduction, the defendant intended to impute to him a want of chastity.

At common law the words laid in the complaint were not actionable in themselves, or by reason of the existence of extraneous acts and circumstances tending to prove that they were spoken for the purpose of imputing a want of chastity; because unchastity, as a subject of

ecclesiastical cognizance, was not punishable in common-law courts. In that particular, however, the common law has been changed by the Code law of the state. Section 46, Civil Code, declares:

"Slander is a false and unprivileged publication other than libel, which (1) charges any person with crime, or with having been indicted, convicted, or punished for crime; (2) imputes in him the present existence of an infectious, contagious, or loathsome disease; (3) tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit; (4) imputes to him impotence or a want of chastity; or (5) which, by natural consequence, causes actual damage."

And upon subdivision 4 of the section this action was brought.

Plaintiff did not consider the words laid in his complaint as slanderous in themselves. He therefore connected them, by proper averments, with the extrinsic facts and circumstances in which they were published, in order to show the slanderous meaning expressed by them.

On the complaint defendant took issue by specific denials of each of its averments; and he affirmatively alleged that there was in general circulation, in the neighborhood and surrounding country where Barbara M. Hook and the plaintiff resided, a report prejudicial to the character of the plaintiff as to his chastity, in connection with the name of the said Barbara, and for the purpose of ascertaining the truth of the report he interviewed the plaintiff himself on the subject, and in that interview the plaintiff acknowledged that the report was true; and afterwards, when the father of the plaintiff and other persons made inquiries of him as to the matter, he spoke to them the words laid in the complaint, without meaning, or intending thereby to assert or charge, that the plaintiff was, in fact, guilty of unchastity.

The issues raised by the answer involved the publication of the words laid in the complaint, the truth or falsity of the extrinsic facts and circumstances in which they were published, whether they were published concerning the plaintiff, and whether they were understood by the persons in whose presence they were published to have the slanderous meaning imputed to them.

On the trial of the questions at issue plaintiff rested his case upon evidence tending to prove the publication of the words as averred in his complaint, the pendency of the action for seduction, and the conversations between defendant and himself, and defendant and other persons, as to the transactions involved in that action, without evidence that the persons with whom the defendant had those conversations understood the meaning of the words to be what the plaintiff alleged. There was a motion made for a nonsuit, which was denied. The defendant was then called as a witness in his own behalf, to testify as to the conversations between himself and the plaintiff and other persons in connection with the charge against him, the trans-

actions involved in the seduction case, and the facts and circumstances in which he spoke the words laid in the complaint; but the plaintiff objected "to any testimony being introduced on the part of defendant for purposes of justification," and the court sustained the objection on the ground that the defendant had not pleaded justification; therefore the testimony of the defendant was excluded from the case except in mitigation of damages, for which purpose only it was admitted. This was error.

The action was founded, not only upon the publication of the words, but upon the extrinsic facts in connection with their publication, which, it was alleged, gave them their slanderous meaning; and as the defendant took issue with the averments of the complaint, the plaintiff, to make out his case, was bound to prove all the material averments, and the defendant, on the general issue, had the right to disprove them. The law of that subject is thus clearly expressed by SHAW, C. J., in *Carter v. Andrews*, 16 Pick. 6:

"Where words are used in a particular sense it is in consequence of some usage or agreement, or of some report in circulation, or of the time, place, or manner in which the conversation was held; in short, of some fact capable of being averred in a traversable form, so that it may be put in issue and proved or disproved. If the words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, the plaintiff must undertake to prove that fact, and the defendant must be at liberty to disprove it."

The exclusion of the testimony was therefore erroneous, and as the words in themselves were not actionable, and the plaintiff failed to prove that the persons in whose presence they were published understood them to have the slanderous meaning charged by the plaintiff, the judgment is erroneous.

It has been held that persons who heard the words charged to be slanderous could not be permitted to state what meaning they understood the defendant to convey by the words. In *Snell v. Snow*, 13 Metc. 278, which was a case of slander, SHAW, C. J., passing on this point, says:

"The judge very properly decided that the witness might testify as to any existing facts or circumstances to which the defendant alluded and referred, if any; but, having given the whole conversation, it was for the jury to determine what was meant by the language used, and that it was not competent for the witness to testify to his understanding of the defendant's meaning in the language used. If the words, in their ordinary sense, according to the rules of language, imputed a charge of unchasteness and crime, or if, taken in connection with other facts or words, they would bear that meaning, we are to presume that the jury would so find."

To the same effect will be found the cases of *Van Vechten v. Hopkins*, 5 Johns. 211; *Gibson v. Williams*, 4 Wend. 320, 325; *Beardsley v. Maynard*, Id. 359; *Goodrich v. Davis*, 11 Metc. 484; and *White v. Sayward*, 33 Me. 322.

But, in such cases as the one under consideration, the true rule deducible from the modern authorities, including those of our own state,

makes the averment and proof of the extrinsic facts in which words are published, and of their meaning in connection with those circumstances, essential to a recovery in the action. The rule is thus stated in *Maynard v. Firemen's Fund Ins. Co.* 34 Cal. 48:

"Where, in an action for libel, the words complained of are not *per se* libelous, what the defendant intended and understood them to mean, and what they were understood to mean by those to whom they were published, constitute a proper subject of averment in pleading and of proof on the trial; and if what was so intended and understood by the defendant, and understood by those to whom the words were published, was libelous, the words are actionable."

The law thus enunciated was afterwards approved in *Chamberlin v. Vance*, 51 Cal. 75, which was an action of slander like the one under consideration; and, under the law, it was incumbent on the plaintiff in this case, in order to recover, to aver and prove (1) that the words were actually used in their actionable sense, and were applied to the plaintiff; (2) that the hearers so understood them; and, upon this point, the testimony of the hearers as to how they understood them is admissible. *Smart v. Blanchard*, 42 N. H. 149; *Russell v. Kelly*, 44 Cal. 641; *Mix v. Woodward*, 12 Conn. 262; *Nelson v. Borchenius*, 52 Ill. 236; *Briggs v. Byrd*, 11 Ired. Law, 353; *Tompkins v. Wisener*, 1 Sneed, 458; *Leonard v. Allen*, 11 Cush. 241.

The averments of the complaint upon these points were sufficient; but, as the plaintiff failed to prove how the words were understood by the persons who heard them, he failed to make out his case, and the verdict and judgment are erroneous.

Judgment and order reversed, and cause remanded for a new trial.

I concur: Ross, J.

I concur in the judgment: McKINSTRY, J.

(67 Cal. 86)

OAKLAND BANK OF SAVINGS v. APPELGARTH. (No. 9,636.)

Filed May 28, 1935.

1. TENDER, SUFFICIENCY OF—OBJECTION TO—WAIVER OF.

The sufficiency of the amount tendered by a debtor to his creditor as payment of his debt must be objected to at the time of the tender, or the objection thereto is waived. Code Civil Proc. Cal. § 2076.

2. MORTGAGE—PAYMENT OF TAXES ON.

A mortgagee is not bound to pay taxes assessed on his mortgage, and also pay taxes upon the deposit of money in court made by the mortgagor for the payment of a mortgage.

In bank. Appeal from the superior court of the county of Merced. J. K. Law, for appellant.

W. S. Goodfellow and E. Jackman, for respondent.

Ross, J. Certain costs of suits, counsel fees, and taxes are the matters in dispute on this appeal. The action was brought to foreclose a certain mortgage given by defendant to secure a promissory note

executed by him to the plaintiff. The note and mortgage being overdue were sent by plaintiff to an attorney at Merced for purposes of foreclosure, and the evidence indicates a sort of race between the attorney and the derelict debtor as to which of two events should first take place,—a tender of the money by the debtor, or the institution of the suit by the attorney. The court below found that the tender was first made, and we are not prepared to say from the record that its conclusion in that behalf was incorrect. The court further found that the amount tendered by the defendant was \$6,344.55, whereas the amount that was really then due from him was \$6,383.29, so that the full amount due was not tendered. But the court found also "that plaintiff did not make or specify any objection to said sum of \$6,344.55, or to the amount thereof, nor did plaintiff specify any other as the amount which it required, but then and there refused, and ever since has refused, to accept from defendant said sum, or any part thereof; that defendant has at all times been ready and willing to pay to plaintiff said sum of \$6,344.55, and did at the time of filing his answer herein bring into court and deposit therein, for the plaintiff, the said sum of \$6,344.55, so tendered to plaintiff as aforesaid."

The court below further found "that prior to said first day of September, 1882, (the date of the tender), the value of said mortgage was assessed to plaintiff in the county of Merced, for state and county taxes for the fiscal year ending June 30, 1882, but said first day of September, 1882, was before the tax levy of said fiscal year; that the amount of such levy, in respect of said mortgage assessed to plaintiff as aforesaid, computed according to the tax levy for the preceding year, was the sum of \$113.60, and that defendant was, on said first day of September, 1882, entitled to retain and deduct from the amount due on the face of said note and mortgage the said sum of \$113.60, upon satisfying the mortgage. The court therefore finds that the sum of \$6,344.55 tendered by defendant to plaintiff on the first day of September, 1882, was more than plaintiff was entitled to recover upon said note and mortgage on said day."

This view of the court below was based upon that provision of section 3627 of the Political Code wherein it is declared that the taxes therein referred to "shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured. If the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and, to the extent of such payment, a full discharge. If any such security or indebtedness shall be paid by any such debtor or debtors after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

In so far as the question of costs and counsel fees is concerned, it is not necessary to determine whether or not the views of the court below, in the respect last indicated, were correct; for, by section 2076 of the Code of Civil Procedure, it is provided that "the person to whom a tender is made, must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards." This provision of the statute, applied to the facts stated in the finding first above set out in detail, precludes the plaintiff from now saying that because the amount tendered by defendant was \$38.74 less than the amount due on the note and mortgage, the tender was not good.

But in one respect the court below was in error. In addition to the findings already noticed the court found that the state and county taxes upon the mortgage assessed to plaintiff for the fiscal year ending June 30, 1882, and amounting to \$113.60, were not paid by plaintiff, but became and were, prior to February 2, 1883, a lien upon the property of defendant in the mortgage described; and on the twelfth day of February, 1883, the defendant paid the said taxes, with costs and charges thereon, amounting, in the aggregate, to \$121.36. The court further found "that the said sum of \$6,344.55, deposited in court by defendant as aforesaid was assessed for taxes to the county treasurer of Merced county for the fiscal year ending June 30, 1883, and that the taxes thereon, amounting to the sum of \$126.89, were, on the thirty-first day of March, 1883, paid under the direction of the court by said county treasurer out of said sum of \$6,344.55." The effect of the action of the court below was to make the plaintiff pay the taxes upon the mortgage, and also upon the money. This was erroneous. It was rightly held that plaintiff should not recover costs of suit or counsel fees, and should be charged with the amount of the taxes upon the mortgage, paid by defendant, but should not be charged with the taxes upon the money. Defendant is entitled to his costs of suit.

Cause remanded, with direction to the court below to modify the judgment so as to accord with these views. Motion to dismiss appeal will stand denied.

We concur: MYRICK, J.; MCKINSTRY, J.; SHARPSTEIN, J.; MORRISON, C. J.

(2 Cal. Unrep. 481)

PEOPLE *ex rel.* LEVERSON and others *v.* THOMPSON. (No. 9,846.)

Filed May 28, 1885.

CONSTITUTIONAL LAW—LEGISLATURE—MANNER OF READING BILLS.

Under the provision of the California constitution, art. 4, § 15, which requires that every bill shall be read on three several days in each house, it is not required that the bill shall be read on three several days after an amendment thereto.

Department 1. Application for *mandamus* to compel defendant, the secretary of state, to count and intimate the votes cast for representatives to congress at the last regular election.

M. R. Leveson, G. W. Chamberlain, and E. C. Marshall, Atty. Gen., for petitioners.

Ross, J. The real ground of the petitioner's objection to the act of the legislature of March 13, 1883, entitled "An act to divide the state of California into congressional districts," is that the bill was not read on three several days in each house *after amendment*. The constitution in terms requires that every bill shall be read on three several days in each house, unless in case of urgency such reading be dispensed with as provided for. Section 15, art. 4, Const. And it has already been held here that when the constitution says the bill shall be read, it means that it shall be read *at length*, (*Weill v. Kenfield*, 54 Cal. 111;) that is to say, it shall be read at length in its then condition. The constitution makes express recognition of the fact that a bill may be amended in either house, but does not provide for a reading thereof in each house on three several days *after amendment*. "Any bill may originate in either house, but may be amended or rejected by the other." Section 16, art. 4, *supra*. If petitioners' claim be well founded, a bill which originated in the assembly, for example, and was there properly read on three several days and regularly passed and sent to the senate, should in the latter body be amended and properly passed, it would have to be again read in the assembly on three several days. We find no warrant in the constitution for such a claim. If the framers of that instrument had intended to require a reading in each house on three several days of every bill *after amendment*, it would have been an easy matter to have said so, and as the provision with respect to the passage of bills is extremely explicit, it is fair to presume that there was no such intention on the part of the constitutional convention. We have thought it best to dispose of the petitioners' application for the writ upon the merits, rather than upon technical objections that might otherwise be in the way of granting it.

Writ denied and petition dismissed.

We concur: MCKINSTRY, J.; MCKEE, J

67 Cal. 84)

WEIHE v. STRATHAM. (No. 8,256.)

Filed May 28, 1885.

ADMINISTRATOR'S BOND, ACTION ON—ACCOUNTING BY ADMINISTRATOR PREREQUISITE.

An action is not maintainable upon an administrator's bond for the amount of a claim unlawfully paid by him, until he has made an accounting to the probate court, and refused to pay any amount which may thereon be adjudged against him.

Department 1. Appeal from the superior court of the county of Fresno.

H. S. Dixon, for appellants.

Sayle & Harris, for respondents.

Ross, J. This is an action by the heirs of William W. Hill, deceased, against the administrator of the estate and his bondsmen, to recover upon the bond, because of the allowance by the administrator and the probate judge, of a claim against the estate alleged to have been barred by the statute of limitations and otherwise invalid, and its subsequent payment, in part, by the administrator, but without an order of the probate court. It affirmatively appears from the complaint that the administration of the estate of the deceased Hill is still pending in the probate court, and that no account of his administration has been presented by the administrator. It has several times been decided by this court that the allowance of a claim by the administrator and probate judge is not conclusive upon the heirs, but that they may contest such allowance in subsequent proceedings of the probate court. Code Civil Proc. § 1636; *Estate of Loshe*, 62 Cal. 413; *Estate of Hill*, Id. 186. If the allowance of the claim sought to be contested by the present suit was improperly had, and objection is made at the proper time in the probate court having control of the administration, that court will doubtless vacate the allowance and compel the administrator to account for the money paid thereon out of the funds of the estate. It is for the probate court to settle the accounts of the administrator, and we have frequently so held. *In re Curtiss*, 4 PAC. REP. 578; *Chaquette v. Ortet*, 60 Cal. 594, and authorities there cited. After the *status* of the accounts has been fixed, if the administrator shall fail to pay what, if anything, may be adjudged against him, the plaintiffs will have their action upon the bond.

Judgment affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

(67 Cal. 85)

RUTLEDGE v. SUPERIOR COURT. (No. 11,053.)

Filed May 28, 1885.

JUSTICE'S COURT—NOTICE OF APPEAL—DESIGNATION OF PERSONS GIVING NOTICE AS ATTORNEYS.

On appeal from a justice's court, the notice of appeal, if sufficient in other respects, is not rendered ineffectual by the fact that the persons who appeared for appellant in signing the notice, omitted to designate themselves as the attorneys for appellant.

Department 1. Application for writ of prohibition.

S. M. Buck and *A. J. Monroe*, for petitioner.

J. D. H. Chamberlin and *Frank McGowan*, for respondents.

Ross, J. In an action brought in a justice's court, entitled *Burns v. Rutledge*, judgment was entered for defendant for \$10 damages, and \$246.20 costs of suit. The plaintiff's attorneys of record thereupon, and within statutory time, served upon the attorneys for the defendant, and filed with the justice a notice of appeal, in the usual form, stating that the plaintiff thereby appealed to the superior court of Humboldt county, "from the judgment made and entered in justice's court in said action, against plaintiff and in favor of said defendant, on the twenty-sixth day of August, 1884, and from the whole thereof; and you will further take notice that this appeal is made upon both questions of law and fact, and that a bond on appeal, in due form of law, has been filed herewith. September 22, 1884. Very respectfully yours, [signed,] J. D. H. CHAMBERLIN and FRANK MCGOWAN."

The objection made to this notice is that the words "attorneys for plaintiff" did not follow the names of the gentlemen signing the notice. None of the cases referred to by the counsel for petitioner at all sustain the point, and we think there is no merit whatever in it. The notice was signed by the attorneys who appeared for the plaintiff in the case, and distinctly stated that the plaintiff thereby appealed from the judgment. The notice was sufficient.

That the undertaking was sufficient to give the appellate court jurisdiction was distinctly held here in the case of *Ward v. Superior Court*, 58 Cal. 519.

Writ denied, and proceedings dismissed.

We concur: McKee, J.; McKinstry, J.

SUPREME COURT OF KANSAS.

(33 Kan. 640)

CORBIN v. KINCAID.

Filed June 4, 1885.

1. CHATTEL MORTGAGES—DESCRIPTION OF PROPERTY.

A chattel mortgage, executed September 26, 1881, which substantially describes the mortgaged property as a flock of 600 head of sheep, consisting of wethers, ewes, and lambs, and their increase for the year 1882, owned by and in the possession of the mortgagor, in Linn county, Kansas, is not void because of any insufficiency in the description of the mortgaged property.

2. SAME—AMOUNT SECURED GREATER THAN AMOUNT DUE.

Nor is such a mortgage void because taken for a sum greater than was due, when the excess was small and no fraudulent intention existed on the part of any of the parties.

3. SAME—EXCESS.

Nor is such a mortgage void even as to the increase mentioned therein.

4. SAME—RECORDING.

Nor is such a mortgage void because it was not filed in the register's office on the day of its execution, but was filed therein four days thereafter.

5. SAME—RENEWAL AFFIDAVIT.

Nor is such a mortgage void because of any want of a renewal affidavit under section 11, art. 2, of the act relating to mortgages, so as to prevent the mortgagee from recovering the mortgaged property in an action of replevin brought after his claim was due, and more than one year after the execution of the mortgage, and against a party who had taken possession of the property prior to the expiration of one year after the execution of the mortgage, and who had full knowledge at the time of all the mortgagee's rights, and took the property in violation of such rights.

6. SAME—PRIORITY OF MORTGAGEE'S AGREEMENT.

Where two chattel mortgages are executed on the same day, by the same person on the same property, to two different individuals, K. and V., but with the understanding between all the parties that the mortgage executed to K. should be prior to that executed to V., and K.'s mortgage by its terms is to become due prior to V.'s, *held*, that the understanding between the parties is binding, and that K.'s mortgage is prior to V.'s, although V.'s mortgage may in fact have been first executed and first filed in the office of the register of deeds.

Error from Linn county.

James D. Snoddy, for plaintiff in error.

W. R. Biddle, for defendant in error.

VALENTINE, J. This was an action of replevin brought by Robert Kincaid against B. B. Corbin, to recover a flock of about 600 sheep, the plaintiff claiming the same under a chattel mortgage. A trial was had before the court and a jury, and the jury found in favor of the plaintiff and against the defendant, and found that the value of the property in controversy was \$1,487, and that there was still due on the plaintiff's mortgage \$861.07; and the court rendered judgment in favor of the plaintiff and against the defendant for a recovery of the possession of the property, or, in case a delivery could not be had, then for \$861.07, the amount still remaining due on the plaintiff's mortgage. The defendant, as plaintiff in error, now seeks a

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reversal of such judgment by petition in error in this court. The facts as claimed by the plaintiff below are substantially as follows: Originally, L. F. Williams owned the sheep, and on September 26, 1881, in accordance with a previous understanding, arrangement, and agreement between himself and C. M. Vertrees, his father-in-law, and Robert Kincaid, and N. F. Shaw, he sold and delivered the sheep to Shaw for \$2,000, on time, Shaw securing the purchase money by executing notes and mortgages as follows: A mortgage on the sheep and their increase for the year 1882, and the wool clipped thereon for that year, to Robert Kincaid, to secure two promissory notes for the aggregate sum of \$1,018.72, due in one year; and another mortgage on the sheep and their increase for the year 1883, and the wool clipped thereon for that year, to Vertrees, to secure a promissory note for the sum of \$1,000, due in two years. It was understood by all the parties that the mortgage given to Kincaid should be the first and prior mortgage, and that the one executed to Vertrees should be the second mortgage. The mortgage to Vertrees, however, was executed first, though both were executed on the same day, and on September 26, 1881. Vertrees' mortgage was filed the same day for registration. Kincaid's mortgage was filed on September 30, 1881. On August 19, 1882, Kincaid filed a renewal affidavit in the office of the register of deeds. Some time in September, 1882, and prior to the 20th, Vertrees assigned his note to B. B. Corbin, another son-in-law of his. This assignment was made without consideration, and for the purpose of defeating Kincaid's mortgage. On September 20, 1882, Corbin, with the assistance of Vertrees, took possession of the sheep, and Vertrees thereafter herded them. Kincaid then sought to settle matters with Corbin, but could not do so; and about September 25, and again on September 29, 1882, demanded the sheep from Corbin, but Corbin refused to surrender them, or any part thereof. On September 30, 1882, Kincaid brought this action of replevin against Corbin for the recovery of the sheep.

The defendant disputes many of the foregoing facts. He claims that it was not the understanding or agreement between Williams, Shaw, Vertrees, and Kincaid, that Kincaid's mortgage should be prior to that of Vertrees; and he also claims that he was an innocent and *bona fide* purchaser of the note and mortgage before the same became due, the note being a negotiable instrument. The jury, however, found in favor of the plaintiff and against the defendant upon all the issues, and from the evidence brought to this court we think they found correctly. Hence the decision of this case must be upon the facts as claimed by the plaintiff. Before passing, however, to the special points made by counsel, we might further say that the evidence showed that Kincaid had received on his notes from the wool clipped for the year 1882 the sum of \$374.44; that the expenses for sacks, etc., amounted to \$70; and that the actual credit on the notes was \$304.44. It would seem, however, that the jury credited the note the full amount

of \$374.44, and then found that there was still due to Kincaid on his notes the sum of \$861.07.

We shall now proceed to consider the principal points made by counsel:

1. We do not think that the mortgage is void because of any insufficiency in the description of the mortgaged property. Taking the whole of the mortgage together, and it substantially describes the property as a flock of 600 head of sheep, consisting of wethers, ewes, and lambs, and their increase for the year 1882, owned by and in the possession of Nathaniel F. Shaw, in Linn county, Kansas. This is a sufficient description of the property. *Brown v. Holmes*, 13 Kan. 482; *Shaffer v. Pickrell*, 22 Kan. 619; *Muse v. Lehman*, 30 Kan. 514; S. C. 1 PAC. REP. 804.

2. Nor do we think that the mortgage is void because taken for a sum greater than was due. If it was taken for any sum greater than was due,—and this is certainly questionable,—it was taken for only a small amount more than was due, and was taken inadvertently and by mere mistake, and was not taken or given with any fraudulent intention on the part of any of the parties to either mortgage. This does not render the mortgage void. *Bush v. Bush*, 33 Kan. —; S. C. 6 PAC. REP. 794; *Kalk v. Fielding*, 50 Wis. 340; S. C. 7 N. W. Rep. 296.

3. Nor do we think that the mortgage is void even as to the increase mentioned therein. *Jones, Ch. Mortg.* §§ 140, 149, and cases there cited.

4. Neither do we think that the mortgage was void because it was not filed in the register's office on the day of its execution, but was filed therein four days thereafter. *McVay v. English*, 30 Kan. 368; S. C. 1 PAC. REP. 795; *Wilson v. Leslie*, 20 Ohio, 161, 166.

5. Neither do we think that the mortgage was void when this action was brought because of any want of a renewal affidavit under section 11, art. 2, of the act relating to mortgages, (Comp. Laws 1879, c. 68, § 11.) The defendant below had actual knowledge of the plaintiff's mortgage and of his rights, and took possession of the property with such knowledge, claiming to have the prior right thereto, in violation of the plaintiff's rights; and all this transpired within less than one year after the execution of the plaintiff's mortgage, and at a time when no one would claim or even pretend that any renewal affidavit was necessary. A cause of action in replvin or for conversion then arose in favor of the plaintiff and against the defendant; and that cause of action was not satisfied, annulled, or barred by any failure on the part of the plaintiff to afterwards file a renewal affidavit. In support of these propositions see the following authorities: *Frank v. Playter*, 73 Mo. 672; *Newman v. Tymeson*, 12 Wis. 448; *Case v. Jewett*, 13 Wis. 498; *Lowe v. Wing*, 56 Wis. 31; S. C. 13 N. W. Rep. 892; *Meech v. Patchin*, 14 N. Y. 71; *Edson v. Newell*, 14 Minn. 228, (Gil. 167.)

6. We think that under the agreement, understanding, and arrange-

ment between the parties, and in accordance therewith, Kincaid's mortgage was prior to that of Vertrees', notwithstanding the fact that Vertrees' mortgage was executed and filed in the register's office prior to Kincaid's. The arrangement between the parties was binding. *Chadbourn v. Rahilly*, 28 Minn. 394; S. C. 10 N. W. Rep. 420; *Freeman v. Schroeder*, 48 Barb. (N. Y.) 618; *Wray v. Fedderke*, 43 N. Y. Super. Ct. 335; *Matthews v. Everitt*, 23 N. J. Eq. 473; *Wheeler v. McFarland*, 10 Wend. (N. Y.) 318; *Noyes v. White*, 9 Kan. 640. And as the two mortgages were given on the same day, by the same person, on the same property, and to carry out one principal intention and transaction, they should be treated very much as one mortgage given to or owned by different individuals, securing notes belonging separately to such individuals, and then, in the absence of any agreement or paramount equity giving priority in the payment of the notes, the note first falling due should be first paid, and should in this respect have priority. *Isett v. Lucas*, 17 Iowa, 503; *Richardson v. McKim*, 20 Kan. 346; *Aultman-Taylor Co. v. McGeorge*, 31 Kan. 329; S. C. 2 PAC. REP. 778; 4 Wait. Act. & Def. 591.

We perceive no error in the instructions of the court below to the jury, nor any error in the court's refusal to give the instruction asked by the defendant; indeed, we do not think that any material error was committed in the case, and therefore the judgment of the court below will be affirmed.

(All the justices concurring.)

(33 Kan. 675)

In re BURROWS.

Filed June 4, 1885.

1. SUPPLEMENTARY PROCEEDINGS—CONSTITUTIONALITY OF KANSAS STATUTE.

The provisions of the Code "in aid of execution," conferring upon the district judge the power to require a judgment debtor to appear before him to answer concerning his property, which he unjustly refuses to apply towards the satisfaction of a judgment rendered against him, and to order any money in his actual possession and under his control, not exempt by law, to be delivered up and applied towards the satisfaction of the judgment under which the proceedings are had, and to enforce said orders by proceedings for contempt in case of refusal or disobedience, are not violative of sections 5, 10, or 16 of the bill of rights of the constitution of the state, or of the fifth amendment of the federal constitution.

2. SAME—JURY TRIAL.

A judgment debtor is not entitled to a jury trial before a district judge, upon his examination, under the provisions of the Code "in aid of execution," as to whether he unjustly refuses to apply money in his possession and under his control, not exempt by law, towards the satisfaction of the judgment under which the proceedings are had.

3. SAME—COMMITMENT FOR CONTEMPT.

Where a judgment debtor has been examined before a district judge, in accordance with the provisions of the Code "in aid of execution," and his examination has resulted in the disclosure that he has upon his person, and under his actual control, money, not exempt by law, which he unjustly refuses to apply towards the satisfaction of the judgment under which the proceedings are had, and the judge thereupon orders him to deliver over sufficient of said money to satisfy the judgment and costs, and the judgment debtor willfully disobeys the

order, the district judge may enforce the same by proceedings for contempt; and under such proceedings may commit him to the jail of the county until the judgment and costs, and the costs of the proceedings for contempt, are satisfied.

Original proceedings in *habeas corpus*.

J. S. Dean, for petitioner.

J. H. Morse, for respondent.

HORTON, C. J. On March 25, 1884, F. H. Kollock and B. Fanning recovered before a justice of the peace of Marion county, in this state, a judgment against Melvin Burrows, aggregating, with costs, \$325.30. On June 7, 1884, an abstract of the judgment was filed and docketed in the office of the clerk of the district court of said county. On the same day an execution was issued upon the judgment to the sheriff of Marion county against the property of the judgment debtor. This execution was returned unsatisfied, and the judgment still remains unsatisfied. Subsequent to the return of the execution, proceedings were taken before the district judge of Marion county against the debtor, under the sections of the Code "in aid of execution," to compel him to answer concerning his property, which the judgment creditors alleged he unjustly refused to apply towards the satisfaction of their judgment. The judge found that Burrows had, at his examination, upon his person and under his actual control, money to the amount of \$1,000, not exempt by law, and he then ordered him to apply sufficient of said moneys so in his possession towards the satisfaction of the judgment against him. Burrows wholly failed and neglected to comply with the order. Thereupon he was arrested, brought before the judge, and upon a hearing it was adjudged that he was guilty of contempt in disobeying the order directing him to pay said judgment. It was further ordered that he be committed to the jail of Marion county until he paid the said judgment, with interest and costs; and also the costs of the proceedings for contempt, amounting to \$26.60.

It is claimed, on behalf of Burrows, that the order of the district judge committing him to the jail of Marion county until he should pay the amount of the judgment of March 25, 1884, and the provisions of the Code authorizing his examination and commitment, are violative of section 5 of the bill of rights of the constitution of the state, which provides that "the right of trial by jury shall be inviolate;" also of section 10 of the bill of rights, that "no person shall be a witness against himself;" also of section 16 of the bill of rights, that "no person shall be imprisoned for debt except in cases of fraud;" and also are obnoxious to the fifth amendment to the federal constitution, that "no person shall be deprived of life, liberty, or property without due process of law."

The principal contention is that Burrows had the right, upon his examination, to have the question of his ability to pay the judgment decided by a jury. *Ex parte Grace*, 12 Iowa, 208, is cited to support this proposition. Therein it is decided that, under a somewhat sim-

ilar provision of the Iowa statute, the court has not the power to punish for contempt without giving the party charged a jury trial. The court in that case pronounces the statute under which the proceedings were had offensive to a peculiar provision of the constitution of Iowa in reference to trial by jury, said to have been introduced into the constitution to secure fugitive slaves the right to such trial. Mr. Pomeroy, in his notes in Sedgwick on Statutory and Constitutional Law, 490, says, in reference to this case: "But this decision is probably exceptional; for a similar statute exists in many states,—in most of those which have adopted the New York Code of Procedure,—and seems to have raised no objection." The proceeding in aid of execution, though created by statute, is a proceeding in the action in which the judgment was recovered, after the judgment debtor has had a hearing and trial, and is a substitute for the creditors' bill formerly used in chancery. The proceeding is a simple regulation of well-established and well-defined jurisdiction, which courts of equity were accustomed to employ. After the decree in a court of equity for the delivery of the property or effects, the debtor, upon disobeying the decree, was adjudged for his contumacy guilty of contempt of the authority of the court. He, therefore, could be imprisoned so long as he remained in contempt. Obedience, however, to the decree,—that is, the delivery of the property,—would terminate the imprisonment at any time. The purpose of the statute is to require the delivery of the property of the judgment debtor for the payment of his debts; and if it is made, the debtor cannot be imprisoned. It is only when the debtor has property which he unjustly refuses to apply towards the satisfaction of a judgment, after being afforded the opportunity so to do, that he can be imprisoned. "The imprisonment is not for debt, but for the neglect and refusal to perform a moral and legal duty, the performance resting in his ability." BRICKELL, C. J., in *Ex parte Hardy*, 68 Ala. 339.

It was said in *Kimball v. Connor*, 3 Kan. 414, that the provision of the bill of rights concerning jury trial does not require every trial to be by jury; "nor does it contemplate that every issue which, by the laws in force at the adoption of the constitution of the state, was triable by jury should remain irrevocably triable by that tribunal. Trial by jury is guarantied only in those cases where that right existed at common law. Such is the meaning of the constitutional provision referred to; and in statutory proceedings, proceedings in chancery, etc., the legislature is fully competent to dispense with the jury." Further, in the case of *Ex parte Grace*, *supra*, cited by counsel, it was said: "The failure of the debtor to surrender his property liable to execution to the payment of the judgment might well be such fraud as that, within the meaning of the constitution, he would forfeit his right to claim exemption from imprisonment. Not only so; but if the fraud was once found by a competent tribunal, the correctness of that finding could not be reviewed in another court or by any judge upon

habeas corpus." *State v. Becht*, 23 Minn. 411; *Kearney's Case*, 13 Abb. Pr. 459; *Ex parte Smith*, 53 Cal. 204; *Ex parte Cohn*, 55 Cal. 193; *People v. Cowles*, 3 Abb. Ct. App. 507; *State v. Burrows*, 38 Kan. —; S. C. 5 PAC. REP. 449.

Counsel refer to the case of *Ex parte Hardy*, 68 Ala. 303, as decisive that the sections of the Code under consideration authorize imprisonment for debt. That decision was rendered by a divided court, and to us the dissenting opinion of Chief Justice BRICKELL is the more satisfactory. It was no violation of the constitution to require the judgment debtor to answer, in a civil action, concerning his property, especially as he claimed no exemption on the ground that his answers might criminate himself. Section 485 of the Code reads:

"No person shall, on examination pursuant to this article, be excused from answering any question on the ground that his examination will tend to convict him of a fraud; but his answer shall not be used as evidence against him in a prosecution for such fraud."

We therefore conclude that the provisions of the Code "in aid of execution," conferring upon the district judge the power to require a judgment debtor to appear before him to answer concerning his property, which he unjustly refuses to apply towards the satisfaction of a judgment recovered against him, and to order any money or other property in his actual possession and under his control, not exempt by law, to be delivered up and applied towards the satisfaction of the judgment under which the proceedings are had, and to enforce said orders by proceedings for contempt in case of refusal or disobedience, are not violative of sections 5, 10, or 16, of the bill of rights of the constitution of the state, or the fifth amendment of the federal constitution. Sections 483, 490, Code; *State v. Burrows*, *supra*.

Counsel call attention to *Bank v. Bank*, 6 Ohio St. 254, as establishing the doctrine that the district judge has no authority to require a judgment debtor to deliver over money in his hands, and under his control, to satisfy a judgment rendered against him. That case merely decides upon this point that no peremptory order to pay the debt or to deliver the property can be made against a third person or a stranger to the original judgment. In such a case the judge is to order the property or debt due the judgment debtor to be applied to the satisfaction of the judgment; thus fixing the right of the judgment debtor, so that when possession of the property is obtained, or the debt collected by a sheriff or receiver, under section 491 of the Code, the proceeds may be applied to the discharge of the judgment. It is asserted that as Burrows was required to pay the original judgment, the order of commitment is void, because greatly in excess of the judge's power to punish for a contempt. Section 2 of chapter 28, Compiled Laws of 1881, is cited as limiting the powers of judges at chambers to punish for contempt to a fine not exceeding \$100 and imprisonment.

We think the sections of the statute "in aid of execution" confer

the power upon the district judge to imprison a judgment debtor who unjustly refuses to apply money in his possession and under his control, not exempt by law, towards the satisfaction of a judgment rendered against him, after being afforded the opportunity so to do, so long as he willfully disobeys the order of the judge. *Kearney's Case, supra; People v. Cowles, supra.* In this case, Burrows is imprisoned simply and wholly because he will not deliver up money in his possession and under his control in payment of the judgment. He can terminate the imprisonment at any time by the mere exercise of his own will; that is, by satisfying the original judgment and costs, and the costs of the supplementary proceedings,—all of which, under the findings of the district judge, he has the ability to do.

The claim that the examination of the judgment debtor outside of the county of his residence renders the proceedings void, is not well taken, because it appears from the record that the examination outside of Marion county was had with the consent of all the parties, and that subsequently the hearing of the case was renewed in Marion county, where all of the evidence taken at the examination was read and considered, and the order for the payment of the judgment was made in the county where the debtor was served and resided. *State v. Burrows, supra.*

It is finally alleged that the order of commitment is illegal, because the judge did not reduce all his orders to writing, together with the minutes of the proceedings, and file the same with the district clerk of Marion county. It appears from the evidence that the terms of the statute were complied with, excepting that the clerk failed to enter the same upon his execution docket. This omission or irregularity of the clerk in no way affects the validity of the commitment.

The petitioner must be remanded.

(All the justices concurring.)

(33 Kan. 626)

CAVENDER, Substituted, etc., v. ROBERSON and another, Partners, etc.

Filed June 4, 1885.

1. SALE—FRAUD—REMEDY OF PURCHASER.

Where a seller is given by the purchaser authority to select and ship to him a stock of staple groceries, at 15 to 20 per cent. less than he could buy them elsewhere, and subsequently the seller selects, puts up, bills, and ships to the purchaser a stock of groceries, part of which is spoiled, unsalable, and worthless, and the seller fraudulently makes out a bill with prices above the current prices for staple goods, and the purchaser is thereby deceived and defrauded, the purchaser is not restricted to his right to rescind the contract on the discovery of the fraud, but he may retain the goods, and, in an action to recover the contract price, have allowed the damages to which he is entitled on account of the misrepresentations and fraud of the seller.

2. PRACTICE—INSTRUCTION—EVIDENCE.

Where an instruction contains an intimation of fact upon a particular point not fully supported by the evidence, and it is apparent from the special findings that such instruction misled the jury, and a part of the damages allowed in the case may have been founded upon such instruction, the judgment must be reversed.

3. SAME—APPEAL—CASE MADE—EVIDENCE.

Where the case made recites that, although it "does not contain all of the evidence in minute detail, yet it contains the substantial parts of the evidence," *held*, that the record will be interpreted to contain, in substance, all the evidence offered upon the trial.

Error from Atchison county.

Action commenced by the Atchison Savings Bank against J. M. Roberson and F. I. Roberson, partners as J. M. Roberson & Co., on July 14, 1882, upon the following written instrument, before a justice of the peace of Atchison county.

"\$278.16.

ATCHISON, KAN., June 16, 1882.

"Fifteen ——— after date, we promise to pay to the order of G. Cavender, two hundred and seventy-eight 16-100 dollars, value received, with interest at 10 per cent. per annum after maturity.

[Signed]

"J. M. ROBERSON & Co."

The bill of particulars alleged that at the time of the execution of said written instrument, it was the agreement between the parties that said instrument should be due and payable 15 days after date, but, by mistake in writing the same, the word "days" was omitted therefrom, but that in fact said note matured and became due on July 4, 1882.

The case was appealed to the district court, and while the action was pending in that court, the bank assigned the written instrument sued upon to Frank Cavender, who was, by leave of the court, substituted as plaintiff. The instrument between the parties was treated as a promissory note, payable in 15 days after date. The defendants challenged the consideration of the note, and alleged that their names were obtained from them by fraud and imposition as follows: That it was executed for a stock of goods and groceries purchased of Green Cavender, the payee of the note, just prior to its date, which goods Cavender represented were fresh and first-class quality, and that he would sell the same at prices greatly below the current prices, and greatly lower than the defendants could obtain the goods elsewhere; that he would furnish the goods needed for the defendants and select only such as would be suitable for their trade; that the defendants relied upon the statements and representations of Cavender, and, believing that he would act honestly in the matter, agreed with him to purchase from him groceries to the amount of \$300 to \$500 worth, leaving the selection of the goods to him; that soon after he selected, put up, and shipped to the defendants at Arington, a bill of goods which amounted to \$517.77; that shortly afterwards he shipped to them other bills of goods, aggregating in all \$643.95, at prices charged in the bill; that Cavender did not select suitable goods for the trade at Arington, but instead thereof selected spoiled and rotten goods and unsalable fancy groceries that were worthless; and that instead of charging the defendants for the goods at rates below the prices usually charged, he charged them greatly in excess of the current whole-

sale prices for first-class goods, and in many cases charged the defendants more than the usual retail prices.

Plaintiff replied, alleging sale of goods by G. Cavender to defendants, December 28, 1881, and for which defendants on January 7, 1882, gave a note at 90 days; that on January 9 and February 23, 1882, defendants bought other bills of G. Cavender; that on June 16, 1882, said G. Cavender and defendants had a settlement of said matters, at which said note of January 7, 1882, was surrendered, and said note in suit and another of like tenor and amount given; the two notes aggregating \$516.32.

Trial had at the June term of the court for 1883 to the court, with a jury. The jury returned a verdict for plaintiff, Frank Cavender, and assessed the amount of his recovery at the sum of \$141.78, and also made the following findings of fact:

"Question 1. Did defendants Roberson contract with G. Cavender for from \$300 to \$500 worth of staple groceries in the latter part of December, 1881, at 20 per cent. lower for the goods that he (Cavender) had on hand than said Roberson could buy the same class of goods anywhere else? *Answer.* Yes. Q. 2. Did said Cavender furnish the class and quality of goods he contracted with Roberson to furnish? A. In part. Q. 3. Did said Cavender furnish the said goods at 20 per cent. lower than he (Roberson) could buy the same line of goods from other persons? A. No. Q. 4. Did said Roberson make the selection of the goods? A. No. Q. 5. Did said Roberson rely wholly on said Cavender to honorably make the selection of said goods contracted for? A. Yes. Q. 6. Did said Roberson rely on said Cavender to put the prices of said goods at 20 per cent. lower than the current rates for such goods from other dealers? A. Yes. Q. 7. Did said Cavender charge said Roberson more for said goods than the same line of fresh and new goods were selling for by other dealers; and if yes, about how much more, and about how much higher in per cent.? A. Yes; about fifteen per cent. Q. 8. Did said Roberson give his note for the first bill of goods before having examined the said goods? A. Yes. Q. 9. What was the quality of the goods furnished to said Roberson? A. Poor. Q. 10. Did said Roberson and Cavender have a settlement about said goods at the time the two notes were given by Roberson to Cavender and the first note given up? A. No. Q. 11. Was any portion of the goods furnished by Cavender spoiled, unsalable, and worthless at the time the same were furnished to said Roberson; and if yea, what amount of said goods were so worthless? A. About one-sixth. Q. 12. What was the actual value of all the goods and property furnished by Cavender to Roberson? A. Can't tell. Q. 13. Did Cavender know at the time he furnished said goods to Roberson that a part of said goods were spoiled and worthless? A. He did. Q. 14. What amount of money did Roberson pay Cavender in or about February 11, 1882? A. One hundred and twenty dollars. Q. 15. What amount of value of eggs and butter did Roberson furnish said Cavender after February 11, 1882? A. Between eighty and ninety dollars. Q. 16. Did said Roberson know what the quality of the goods was at the time the same were furnished? A. No. Q. 17. Did said Roberson know anything about what the jobbing or wholesale prices of these goods were? A. No. Q. 18. Did Cavender take advantage of said Roberson's ignorance of the quality and prices of the goods with the intent to commit a fraud on said Roberson in the sale of said goods to him? A. To a certain extent, he did. Q. 19. Did said Cavender act honestly and in good faith with said Roberson in the selection of said goods, and charging the prices he did therefor? A. We think not."

The plaintiff filed a motion for a new trial, which was overruled; and judgment rendered upon the verdict of the jury. The plaintiff excepted, and brings the case here.

Jackson & Royce, for plaintiff in error.

J. C. Greenawalt and *S. H. Glenn*, for defendants in error.

HORTON, C. J. Upon the trial the defendants produced as a witness one D. L. Nesbit, who testified, among other things, "that he had been in the grocery business for twenty years; that he knew the stock of groceries kept by Kimbrough & Trice, who failed in April or May, 1881, and whose stock of groceries was subsequently purchased by Green Cavender; that he went through the stock and examined it; that it was old and shelf-worn; that he did not consider the stock worth to exceed fifty cents on the dollar." He then stated that he knew the prices, generally, of groceries. He was requested to examine the bill of goods bought by the defendants, and, after looking over the same, testified "that he thought he knew what the market value of some of the goods was." He further testified "that he could not state the value of the coffee, mackerel, tea, starch, and tobacco, because there are different grades of such goods, and the bill did not show what grades they were; but he knew the prices of the different grades of those kinds of goods."

The plaintiff then objected to evidence of value because incompetent and irrelevant, and because the market value was within the reach of all; and, further, because the stock of groceries sold to the defendants was old, and the witness was permitted to testify as to the value of new goods. There was no error in the admission of this evidence. Nesbit had seen and examined the goods in stock,—not the particular goods furnished, but the general stock,—and was a competent witness concerning the value of the same.

The answer alleged that Green Cavender "represented to the defendants that his goods in stock were fresh and of first-class quality, and that, as he was about going out of the grocery trade, he would sell the defendants a stock of goods suitable for their trade, at prices greatly below the current cost prices, and greatly lower than the defendants could obtain the goods elsewhere." As the defendants further alleged in their answer that they relied upon these representations in accepting the stock of groceries shipped them, and in executing their notes therefor, the value of the stock sold was a material issue in the case; and the concession by the plaintiff that the stock selected, put up, billed, and shipped out by Green Cavender to the defendants was an old one, is very favorable to the claim of the defendants. The case of *Graffenstein v. Epstein*, 23 Kan. 443, is cited that evidence of the market value of the stock of goods shipped ought not to have been received. That case is not in point. The principle recognized in that case is that "a misrepresentation as to the market price of an article of general commerce made falsely and fraudulently by one party to induce a sale, and relied upon by the other, will not

avoid a contract therefor, when there are no circumstances making it the special duty of the one party to communicate the knowledge he possesses, and none giving him the peculiar means of ascertaining such market price." Here the seller agreed to sell a stock of staple groceries suitable for the defendants' trade, of first-class quality, at prices greatly below the current rates for such goods. The defendants relied upon these representations, and permitted the seller to select and ship the goods. Therefore evidence tending to show that the stock of goods had been fraudulently billed and charged at current rates, and in some instances above current rates, was relevant. *Lord v. French*, 61 Me. 420.

It is claimed that the court committed error in giving and refusing instructions. The third instruction asked for was properly refused, because it virtually took the case away from the jury and directed a verdict for the plaintiff without regard to the defense made in the action. The fourth instruction asked for ought not to have been given, because it did not embrace the law of the case. *Lord v. French, supra*. The fifth instruction asked for and refused was to the effect that if Green Cavender and the defendants had a settlement about their matters in dispute, and if the note in controversy was given in pursuance of such settlement, the defendants were bound by the settlement except for mistake or fraud. The sixth instruction was fully covered by the charge of the court, in the following language:

"It also appears that on or about June 15, 1882, the defendants took up said promissory note of \$517.07, given January 2, 1882, and gave to said Green Cavender the instrument in controversy, and also another instrument, being a promissory note for \$278.16, dated June 15, 1882, and payable fifteen days after date, with interest at ten per cent. per annum after maturity. Said Green Cavender claims that these two instruments were given to take up said note of January 2, 1882, and also to settle all accounts between him and the defendants up to said time. If you find that such was the case and that plaintiff has succeeded to the rights of Green Cavender, and that said instrument was intended to be payable in fifteen days, then plaintiff is entitled to recover the full amount of the face of said instrument, with interest thereon, unless defendants have shown by a preponderance of evidence that there was a mistake in the computation, or that said settlement was obtained by some fraud or imposition on the part of said Green Cavender. If a mistake was made in the computation, you should correct it in your verdict if you have evidence sufficient for the purpose; but if you find that the defendants, at the time of giving said two instruments and the making of said alleged settlement, knew the quality and prices of the goods that they had obtained from said Green Cavender, and that they were giving said instruments in settlement for the same, then they ought not now be assisted by the jury in undoing their work and setting aside their settlement on the ground of the quality or the prices of the goods."

The sixth instruction contained the intimation that Green Cavender agreed to sell the groceries shipped to the defendants at 20 per cent. less than they could be purchased for elsewhere. This instruction was misleading, because the evidence did not fully support it. J. M. Roberson, one of the defendants, testified that Green Cavender

"said he would sell the goods to me at from 15 to 20 per cent. less than I could get them elsewhere." Joseph A. Hamm testified that Cavender said to J. M. Roberson, the purchaser of the goods, "that he was closing out and would sell to him the bill of goods at 15 to 20 per cent. less than he could buy elsewhere, and Roberson said he would buy at these terms, and would leave it to Cavender and me as to what he wanted, and would leave it to us to select the goods." The evidence therefore shows that Green Cavender agreed to sell the stock of groceries charged, to the defendants from 15 to 20 per cent. less than they could buy them elsewhere, but not at 20 per cent. less. The jury evidently followed closely the intimation of the court in their verdict and special findings, because the sixth finding of fact is as follows:

"*Question.* Did said Roberson rely on said Cavender to put the prices of said goods at 20 per cent. lower than the current rates for such goods from other dealers. *Answer.* Yes."

We should also add that there was no statement in the answer alleging that Green Cavender agreed to furnish goods, such as he had in his own stock, at 20 per cent. less than they could be purchased for elsewhere. Counsel for defendants object to the consideration of this instruction and the finding based thereon, because they say the case made does not purport to contain all the evidence. The case does, however, show that it contains the substantial parts of the evidence, and we construe this to mean that it contains, in substance, all the evidence offered upon the trial, although it is not written out in the record in minute detail. The defendants were not restricted to their right to rescind the contract and return the goods. *Weybrich v. Harris*, 31 Kan. 92; S. C. 1 PAC. REP. 271; *Lord v. French*, *supra*; *Wheeler & Wilson Manuf'g Co. v. Thompson*, 33 Kan. —; S. C. 6 PAC. REP. 902.

It is not necessary to dwell upon the other questions in the case. If the jury had returned in their special findings the actual value of the goods furnished by Cavender to the defendants, we might have corrected the judgment of the district court without reversing the same, by the addition of 5 per cent. upon the value of said goods; but to question 12, which was as follows, "What was the actual value of all the goods and property furnished by Cavender to Roberson?" the jury answered, "Can't tell."

On account of the erroneous and misleading instruction which was given without full support of the evidence, the judgment of the district court must be reversed.

(All the justices concurring.)

(33 Kan. 601)

CONTINENTAL INS. Co. v. DALY, Adm'x., etc.

Filed June 4, 1885.

1. FIRE INSURANCE—PAYMENT OF PREMIUM NOTE.

A condition in a fire insurance policy providing that the failure of the insured to pay a premium note when it falls due will relieve the insurer from liability from any loss occurring during such default, is not unreasonable or contrary to public policy; and unless such condition is waived or rescinded by the insurer, the non-payment of the note at the stipulated time involves a forfeiture of the policy.

2. SAME—EXCUSE FOR NON-PERFORMANCE OF CONDITION.

To excuse the non-performance of such a condition it must appear that performance could not by any means have been accomplished, and where the insured dies before the maturity of the premium note, and payment thereof could have been properly made by some one beneficially interested in the policy and in the performance of its conditions, such persons cannot be relieved from the consequences of their default.

3. SAME—CASE STATED.

D. took out an insurance policy upon a dwelling-house, occupied by himself and family, and other exempt property, insuring against loss by fire and lightning, and in consideration gave a premium note, due December 1, 1883. It was stipulated in the policy, in substance, that in default of punctual payment the policy should be forfeited. He died on August 28, 1883, leaving a widow and children, who continued to occupy and use the insured property. On December 23, 1883, when the premium note was due and unpaid, the property was destroyed by fire. *Held*, that the insured property being exempt, vested in the widow and children of the deceased; and that the interest in the insurance policy devolved upon them, and in case of loss, where there was no default, the insurance money would accrue to them, and would not become assets of the estate of the deceased, nor subject to distribution under any law of the state. As the widow and children were beneficially interested in the contract of insurance, and they alone could be affected by the non-performance of the conditions of the contract, it was their duty to have paid the premium note, and, failing in that, they cannot avoid the consequences of non-payment.

Error from Bourbon county.

Action upon a policy of insurance. On December 14, 1882, the Continental Insurance Company of New York City, insured J. L. Daly against loss or damage to a dwelling-house, together with the furniture and bedding therein, on account of fire and lightning, in a sum not exceeding \$700. The term of the policy was five years, and the premium thereon was \$14, which was not paid in cash, but a note was given therefor due December 1, 1883, and bearing interest at the rate of 7 per cent. per annum. The dwelling-house was occupied by the insured and his family as a homestead at the time the policy was executed. Among the stipulations stated in the policy was the following:

"If a note is taken for the premium or any part thereof, it shall be accepted as payment thereof only until the maturity of such note; and if the same be not paid at maturity according to its terms, this policy shall be void so long as the same remains unpaid, unless the time of payment has been duly extended by consent of the superintendent of this company in writing; provided, however, that on payment to the company in New York, or to the western department in Chicago, by the assured or assigns, of all premiums due under this policy and the note given thereon, the liability of this company on this policy shall again attach, and this policy be in force from and after

such payment, unless this policy shall be void and inoperative from some other cause. But this company shall not be liable for any loss happening during the continuance of such default of payment; nor shall any such suspension of liability under this policy, on account of such default, have the effect of extending such liability beyond the period of its termination as originally expressed in writing hereon."

The premium note given by the insured, J. L. Daly, contained the following provision:

"And it is hereby agreed that in case of non-payment of this note at maturity this company shall not be liable for loss during such default, and the policy for which this note was given shall lapse until payment is made to this company in New York or to the western department at Chicago; and in the event of non-settlement for time expired, as per terms in contract, the whole amount of note may be declared earned, due, and payable, and may be collected by law. Given in payment for a policy of insurance. If transferred, either before or after maturity by the company, it is agreed this note shall be subject to all defenses as if owned by the company herein named."

On August 28, 1883, J. L. Daly died, and on the fourteenth day of September following, Sarah C. Daly was duly appointed administratrix of his estate. On December 21, 1883, the property insured was totally destroyed by fire. Soon thereafter a notice of the loss was given to the insurance company, but payment of the insurance money was refused by the company, on the ground of the non-payment of the premium note, which was and is wholly unpaid. On March 13, 1884, Sarah C. Daly, as administratrix of the estate of J. L. Daly, deceased, brought an action in the district court of Bourbon county against the insurance company to recover the amount of the insurance stated in the policy. The cause was tried without a jury at the September term, 1884, and upon an agreed statement of facts the following findings of fact and law were made by the court:

"(1) That J. L. Daly died August 28, 1883, and on September 14, 1883, plaintiff was duly appointed and qualified administratrix of his estate. (2) That the personal property inventoried and subject to payment of debts is \$1,182. (3) That no debts have been proved or presented up to this date. (4) That on December 14, 1882, defendant issued to said J. L. Daly the policy of insurance set up in plaintiff's petition. (5) That the only consideration for said policy was a note of \$14, executed by said Daly to said defendant, dated December 12, 1882, due in one year from the first day of December, 1882, with seven per cent. interest. (6) That said note contained the following stipulation: 'And it is hereby agreed that, in case of non-payment of this note at maturity, this company shall not be liable for loss during such default, and the policy for which this note was given shall lapse until payment is made to the company in New York, or to the western department at Chicago, and in the event of non-settlement for time expired as per terms in contract, the whole amount of note may be declared due and payable, and may be collected by law. Given in payment for a policy of insurance.' (7) That said note is still wholly unpaid. (8) That the property covered by said policy was destroyed by fire without fault of the assured, his executors, administrators, or heirs, on or about December 21, 1883. (9) That said property was owned and occupied by said Daly as a residence at the time of his death, and was owned and occupied by his family, wife and children, as his heirs, at the time it was destroyed by fire. (10) That the value of said property destroyed

was seven hundred (700) dollars. (11) That on January 8, 1884, this plaintiff notified S. G. Parker, a soliciting agent of this defendant in Bourbon county, Kansas, that the property covered by said policy was wholly destroyed by fire on December 21, 1883, and said Parker notified the defendant on the same day by telegraph of such loss. (12) On January 11, 1884, the defendant sent a letter to said Parker, which letter was delivered to this plaintiff, and which is as follows: 'OFFICE WESTERN DEPARTMENT CONTINENTAL INSURANCE COMPANY OF NEW YORK, LAKESIDE BUILDING, CORNER CLARK AND ADAMS STREETS, CHICAGO, January 11, 1884. *S. C. Parker, Fort Scott, Kansas.*—DEAR SIR: Your telegram notifying us that Mr. Daly has lost his dwelling and contents was duly received. We find that Mr. Daly promised to pay a note of \$14.00, on the first of September, 1883, and that he neglected to do so. His failure to keep his agreement in this matter is unfortunate for him, and he, of course, bears the usual penalty. It is to be regretted that he was not more prompt. Yours, truly, A. WILLIAMS, Supt.' (13) That no notice of the death of said Daly was given this defendant until after the loss occurred, unless the publication of the notice of such plaintiff's appointment was such notice. (14) That defendant wrote to J. L. Daly by mail of November 23, 1883, of the time of maturity of said note. (15) That said letter was duly received at Hepler, Kansas, December 24, 1883. (16) That the heirs at law of said Daly are named as follows: Sarah C. Daly, widow; children, Mary E. England, Minnie E. Daly, Edgar C. Daly, Maggie E. Daly, Frederick E. Daly, William C. Daly."

And as conclusions of law upon the foregoing facts the court finds:

"(1) That said defendant waived proof of loss of the property destroyed. (2) That plaintiff is entitled to recover from defendant the amount of loss, \$700.00, less amount of the note and interest, amounting to \$15.70,—the sum of \$684.30."

Upon these findings judgment was entered against the insurance company and the purpose of the proceeding in this court is to reverse that judgment.

E. M. Hulett and J. D. McCleverty, for plaintiff in error.

Bawden & Martin, for defendant in error.

JOHNSTON, J. It is agreed that the only consideration for the insurance policy in suit was the premium note of \$14. In the policy, as well as in the note, it was expressly stipulated that a non-payment of the premium note at maturity would render the policy void, and that the insurance company should not be liable for any loss occurring during the continuance of such default. The note had been due and unpaid for 23 days prior to the happening of the fire which destroyed the property insured, and payment had not been made at the commencement of this action. That the provision prescribing a forfeiture of the policy in case of the failure to pay the premium note when it became due was reasonable and just, and a contract the parties were capable of making, cannot be denied. The premium is the consideration that induces the insurer to assume the risk; its prompt payment is essential to the success of the insurance business, and necessary to enable insurance companies to comply with the contracts entered into with their patrons. To promote punctuality in the payment of premiums, and enable them to meet their engage-

ments, insurance companies usually contract with the assured that a neglect to pay the premium or premium notes when they fall due, will, if a loss occurs during the default, operate as a forfeiture of the insurance money. In a policy containing a stipulation of this character, time is material and of the essence of the contract, and a failure to make payment at the time therein agreed, where there is no waiver of that condition of the policy, will absolve the insurance company from liability. *Critchett v. American Ins. Co.* 53 Iowa, 404; S. C. 5 N. W. Rep. 543; *McIntyre v. Michigan State Ins. Co.* 17 N. W. Rep. 781; *Shakey v. Hawkeye Ins. Co.* 44 Iowa, 540; *Garlick v. Mississippi Valley Ins. Co.* Id. 558; *Greeley v. Iowa State Ins. Co.* 50 Iowa, 86; *Williams v. Albany City Ins. Co.* 19 Mich. 451; *New York Life Ins. Co. v. Statham*, 93 U. S. 24; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543; *Klein v. Insurance Co.* 104 U. S. 88.

The counsel for plaintiff in error are not, as we understand them, opposed to the validity or justness of such a contract, but they insist that there was no default; that the assured was not negligent, but that by the act of God it was rendered impossible for the insured to comply with his contract. They argue that the neglect was on the part of the insurance company in failing to present and prove up the premium note as a demand against the estate of J. L. Daly, deceased, which made it impossible for the administratrix, or any one interested in the insurance policy, to pay the note. The claim is that under our statutes no demand against any estate can be allowed or paid until the claimant first makes oath in open court, or files an affidavit with such demand of its validity and justness; and that the insurance company having failed in this respect, the administratrix of the estate was absolutely prohibited from paying the premium note. This, then, is the excuse given for non-payment. We must briefly inquire of its sufficiency. It will be noted that the payment of the premium upon this policy was a condition, the performance of which was necessary to the continued liability of the insurance company. Under the rule invoked by counsel for defendant in error, it must appear that the thing to be done, or the condition to be performed, could not by any means have been accomplished, either by the insured, or by any other person for him. As a general rule, where a person expressly contracts to do an act lawful and possible at the time, an inevitable accident or other unforeseen contingency, not within his control, will not discharge him from the obligation of his contract, or relieve him, or those claiming through him, from the performance of its conditions, because such accident or contingency might have been provided against in the contract. If the payment of the premium note could have been properly made by the administratrix, or by some one beneficially interested in the policy, and in the performance of its conditions, such persons at least cannot be relieved from the consequences of a default. *Beebe v. Johnson*, 19 Wend. 500; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543; *Evans v. United States L.*

Ins. Co. 64 N. Y. 305; *Roehner v. Knickerbocker L. Ins. Co.* 63 N. Y. 160.

Was the performance of the condition an impossibility in this case? We think not. The duty of paying the premium note did not devolve upon the administratrix, but for reasons other than those stated by her counsel. The plaintiff below, in her character as administratrix, had no interest in the insurance money, nor control over it. If it had been recovered it would not have been assets of the estate, subject to the claims of creditors, nor to distribution under any law of the state. The property insured was exempt to the widow and children of the deceased. The dwelling-house was occupied as a residence by Daly and his family at the time the policy was issued, and until his death in August, 1883, and continued to be occupied by his widow and children after his death until the occurrence of the fire on December 21, 1883. By the provisions of our statute "a homestead * * * occupied by the intestate and his family, at the time of his death, as a residence, and continued to be so occupied by his widow and children after his death, together with all the improvements on the same, shall be wholly exempt from distribution under any of the laws of this state, and from the payment of the debts of the intestate, but shall be the absolute property of the said widow and children." Comp. Laws 1879, c. 33, § 2. It is also provided that, "in addition to her portion of her deceased husband's estate, the widow shall be allowed to keep absolutely for the use of herself and children of the deceased, all personal property of the deceased which was exempt to him from sale and execution at the time of his death." Comp. Laws 1879, c. 37, § 49.

As before stated, all of the property embraced in the policy in question was exempt. Within the policy of our laws upon the question of exemptions, and the liberal interpretation given them, we think the insurance money paid as compensation for the loss of exempt property stands in place of that property. The policy in question contained a clause providing that the insurance company had the option, in case of a destruction of the property by fire or lightning, to rebuild and replace it. If it was so replaced, the widow and children would be entitled to enter upon its occupancy, and hold it as a homestead, exempt from the claims of any of the creditors of the deceased. But in case the company fails to exercise the option of rebuilding the property, it would seem that, for a reasonable time at least, the money paid as compensation for the loss of such exempt property would also be exempt. *Mitchell v. Milhoan*, 11 Kan. 617; *Houghton v. Lee*, 50 Cal. 101; *Probst v. Scott*, 31 Ark. 652; *Cooney v. Cooney*, 65 Barb. 524; *Strouse's Ex'r v. Becker*, 44 Pa. St. 206; *Thomp. Homest. & Ex.* §§ 750, 784.

Here, however, the property insured, upon the death of J. L. Daly, descended to his widow and children, and absolutely vested in them, and was subject to their disposition; and, as we have seen that the

insurance money paid for the loss of their property would also vest in them, it follows that they alone were interested in the contract of insurance, and they alone could be affected by a failure to perform the condition of the contract. If they desired to avail themselves of the benefits of the policy, it was their duty, and not that of the administratrix, to have kept it alive, and to comply with the conditions of the policy to be performed by the insured. There was no obstacle to prevent them from complying with this condition, and, within the rule heretofore stated, they cannot avoid the consequences of their default.

The question raised by counsel for defendant in error, that payment of the premium note could not be made by the administratrix because of the failure of the insurance company to present and prove up the note as a demand against the estate, is therefore not in the case. In view of the conclusions we have reached, the other question raised by plaintiff in error, as to who was the proper party to sue to recover upon the policy, becomes of no importance. It follows from what has been said that the action might have been brought by the widow and children, as they were beneficially interested in the policy. As the contract of insurance was made with J. L. Daly, his executors, administrators, and assigns, it is claimed that the administratrix alone can sue. If suit can be maintained at all by the administratrix, it can only be as trustee of the widow and children of the deceased, who were alone interested in the fund sued for, (Civil Code, § 28;) but whether it can be brought in the name of the administratrix, we need not and do not now decide.

The judgment of the district court will be reversed.

(All the justices concurring.)

SUPREME COURT OF COLORADO.

(8 Colo. 320)

CARLILE, Treasurer, etc., v. PULLMAN PALACE CAR CO.

Filed May 22, 1885.

1. TAXATION—PULLMAN SLEEPING CARS—JURISDICTION OF COUNTY OFFICERS—COLORADO STATUTE.

The revenue officers of a county through which Pullman sleeping cars, operated by a railroad company under a contract with the car company, which is a non-resident corporation, with no place of business in the state, pass, have no jurisdiction to assess and tax such cars.

2. SAME—DUTY OF RAILROAD COMPANY—JURISDICTION OF STATE BOARD—ASSESSMENT, HOW MADE.

Such cars, under the statute, are to be considered as part of the rolling stock employed by the railroad company in the operation of its road, and are to be returned to the state board and assessed with all the other rolling stock and personal property of the railroad company, and such aggregate assessment to be prorated to the several counties.

3. SAME—LIABILITY OF RAILROAD COMPANY.

Whether or not a liability to pay taxes on the sleepers taxed in this case exists against the railroad companies, is not considered.

Error to the district court of Pueblo county.

Geo. Q. Richmond and Bailey & Wilkin, for plaintiff in error.

Markham, Patterson & Thomas, for defendant in error.

BECK, C. J. This action was instituted in the district court of Pueblo county, against the defendant in error, for the recovery of money alleged to be due the county on account of taxes assessed by the county authorities against the defendant in error upon certain sleeping cars used upon the passenger trains of the Denver & Rio Grande and the Atchison, Topeka & Santa Fe Railroads. The court below decided against the authority of the county to levy the taxes, and this writ of error is prosecuted in behalf of the county to test the correctness of the decision. The cause has been submitted upon an agreed statement of facts, which discloses, among other facts, that similar controversies exist in other counties and that the final decision in this case is to operate as a determination of them also.

We learn from the stipulation that the Pullman Palace Car Company, the defendant in error, is a non-resident manufacturing company organized and doing business under the laws of the state of Illinois, where its home office is located. A portion of the business of defendant in error is the building of sleeping cars, and hiring them out to railway corporations throughout the country, to be by them operated upon their lines of railroad for the joint profit of both contracting parties. These contracts, all of which are similar, are to the effect that the Pullman Company will furnish to a railroad company, for a term of 15 years, a sufficient number of sleeping cars to meet the requirements of travel over all lines of railway owned or operated by the railroad company. The cars are to be hauled by the railroad company over the various lines of the road now or hereafter to be

owned or controlled by said company and employed in the transportation of travelers, for its profit, in such manner as, in the judgment of the general manager or superintendent of the railroad, may be best to accommodate passengers. The railroad company is to keep the cars in good running order and repair, and to bear certain running expenses, including light, fuel, lubricating material, and ice; also to bear the expenses of all repairs rendered necessary by accident or casualty. The Pullman Company is to provide the cars; keep the carpets, upholstering, and bedding in good and cleanly condition; furnish necessary employes to preserve order in the cars; collect berth and couch fares; and take proper charge and care of the inside of the cars; in consideration whereof the Pullman Company is to be entitled to collect from persons occupying the berths, and receiving special accommodations in said cars, such sums of money as may be usual on other lines furnishing equal accommodations. It is to have the right to place for sale in such of the ticket-offices of the railroad company as it may desire, tickets for berths, couches, etc.; such tickets to be sold by the agents of the railroad company, without charge to the Pullman Company.

The contract contains an option to the railroad company to provide three-fourths or less of the capital required for furnishing the equipments of said cars, at any time within five years from the date of the contract, and thereupon to become a joint owner with the Pullman Company in such equipment, and to receive a proportional amount of the gains, and bear a like proportion of the losses, accruing to and sustained by the latter company. Another option given the railroad company is that it may terminate the contract itself, in five, eight, or eleven years, by purchasing the sleeping cars and equipments at their actual cash value. There are other provisions and stipulations, but we deem the foregoing sufficient to show the relation existing between the contracting parties.

The sleeping cars furnished under the contract mentioned in the complaint passed daily into and through the county of Pueblo. Those operated in connection with rolling stock of the Denver & Rio Grande Railway were hauled from Denver south to Pueblo, and from that point, by different branches or extensions, to Leadville, Durango, and Antonito, passing through several counties in a single day, all said points being within this state. Those operated on the trains of the Atchison, Topeka & Santa Fe Railway pass daily through the county of Bent, and daily enter into and depart from the county of Pueblo. These trains pass over a continuous line of railway extending from Kansas City, in the state of Missouri, through the state of Kansas, to the terminal point of said railroad in this state, Pueblo. The latter point is also one of the terminal points of the Denver & Rio Grande Railway. The Pullman Company, however, appears to have no principal place of business within this state. The transcript does not disclose the fact whether the Pullman Company has filed in the office

of the secretary of state a copy of its charter of incorporation, in compliance with the requirements of our statute, or not; but it does appear that no provision is made in its contract with the railroad companies for payment of state and county taxes upon said cars.

It further appears that said sleeping cars were operated under said contracts, on the lines of the Atchison, Topeka & Santa Fe Railroads, during the years from 1876 to 1881, inclusive; and upon the Denver & Rio Grande Railroad during the years 1880 and 1881. It further appears that during all said years no return was made or statement furnished to the state board of equalization, either by the railroad companies, or by the Pullman Company, of the number and value of said sleeping cars, as required by the revenue laws of the state; also that no assessment was made thereof by said board for the years aforesaid. The property having been omitted from taxation, the revenue officials of Pueblo county assessed and taxed the same for the years aforesaid, and are now seeking by this proceeding to collect such taxes from the defendant in error.

The important points properly presented for decision upon this record are whether property of this character, and so circumstanced, is subject to taxation under our statutes; and, if it is, whether the authority to make the assessment exists in the county officials under any circumstances, or solely in the state board of equalization.

The principal points urged in favor of the affirmance of the judgment are that the Pullman Company cannot be held liable for these taxes; for, having neither home office nor a principal place of business within the state, the property has no *situs* for taxation; but that, if the property is subject to taxation at all, it can only be legally assessed against the railroad companies who control it under their contracts. The constitution of this state, and the laws passed in pursuance thereof, subject all property, real and personal, within the state, to taxation, that shall not be expressly exempted by law. The property assessed by the officials of Pueblo county was personal property within the state, and it was not exempt by law. Law-writers say, in reference to personal property, that it matters not whether the owner be a private person or a corporation, a resident or a non-resident, or whether the property be permanently located within the state, or be merely employed therein, it is subject to taxation.

The conceded principles governing this subject are that justice demands that all property in the state, not exempt by law, shall be subject to taxation; that no person, or class of persons, whether natural or artificial, shall escape the burdens of supporting the government; and that corporations shall have no greater exemptions in the matter of taxation than are extended to every citizen of the state. Articles of commerce, in transition, are exempt; but no such articles or question is involved in this case. The nature or character of the articles involved in the present controversy, and the purposes for which they were employed by both contracting parties, bring them

within that class of property mentioned in our statute as railroad *equipment* and *rolling stock*. But it appears from the stipulation of facts that the real owner of this property is a non-resident corporation, and it does not appear that the owner has a home, office, or principal place of business within the state. It affirmatively appears that the property is in a constant state of transition, passing from point to point through the state, and some of it, as before stated, passing beyond the limits of the state. Under such circumstances it has no more local existence in one county than in another, of those through which it passes. Transitory personal property must have *situs* for taxation, or it is not subject to any jurisdiction. To hold otherwise would be to subject such property to the jurisdiction of every county wherein it chanced to be on the annual assessment day; and the law is well settled that no class of property can be subjected to such burdens. This would be carrying the power of taxation to the extent of destruction,—an abuse not even to be presumed. *Ogilvie v. Crawford Co.* 2 McCrary, 148; S. C. 7 Fed. Rep. 745; *Carrier v. Gordon*, 21 Ohio St. 605; *Hoyt v. Commissioners*, 23 N. Y. 224. The law is that the residence or principal place of business in the state of the owner, agent, or other person legally interested in movable property, is the *situs* of such property for the purpose of assessment and taxation, although it is liable to be in several different counties every day. See authorities *supra*; *State v. Severance*, 55 Mo. 379–388; *Walton v. Westwood*, 73 Ill. 125.

In view of these principles, and the facts set out in the agreed statement, no difficulty is met in determining the *situs* of the property under consideration. The railroad companies have possession and control of the property, under contracts to continue, at their option, for a long term of years, and during which term they use these cars for the same purposes as they use their first-class passenger cars, and probably realize as much profit therefrom. This possession, control, and community of interest which the railway companies have and exercise, gives the sleeping cars the same *situs*, under the statute applicable to this class of property, as articles of the same class owned by the railroad corporations.

The question of *situs* being disposed of, we will examine the question of jurisdiction to assess and tax this property. Section 10, art. 10, of the state constitution provides as follows:

“All corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal, and other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax.”

Section 3 of the same article requires the passage of general laws prescribing such regulations as shall secure a just valuation for taxation of all property, real and personal. The legislature complied with the mandate of section 3, so far as railroad property is concerned, by the enactment of section 2251, Gen. Laws 1877. This sec-

tion provides for the assessment and taxation of all the property, real and personal, "owned," "belonging to," and "used" by railroad corporations in the operation of their roads in this state. The railroad officials are required to make full returns of all such property. Regulations are prescribed for its valuation and taxation, and the powers and duties of the revenue officials, state and county, with respect to this class of property, are distinctly defined. This section was evidently intended to cover the entire subject of the taxation of railroad property, and to leave nothing used by these corporations out of the list of taxable property, regardless of the condition of the title, and whether the line of railroad lay wholly within the state, or partly within and partly beyond its limits. The legislative power to pass such a statute is unquestionable. *Cooley, Tax'n*, 34; *Pierce, R. R.* 472, 473; *State Railroad Tax Cases*, 92 U. S. 575.

In the words of Chief Justice MARSHALL, in *McCulloch v. State of Maryland*, 4 Wheat. *429, all subjects over which the sovereign power of a state extends, are objects of taxation. Notwithstanding the positive language of section 2251, that every kind of property used in the operation of a railroad shall be assessed for taxation, it is argued, on the part of plaintiff in error, that the provisions of this section reach only the property actually *owned* by the railroad companies, and that property owned by other parties, although exclusively used in the operation of a railway, is subject to taxation, like other property, where located or found, or at the place of its legal *situs*, and by the revenue officials of such locality. This proposition is advanced in support of the jurisdiction assumed by the county officials of Pueblo county to assess the sleeping cars mentioned in the record. We are therefore called upon to define the respective jurisdictions of the county and state officials with respect to this class of property, which necessarily involves a construction of that portion of the section relating to the returns required to be made by the railroad officials to the state board of equalization.

It must be borne in mind that the imposition of a tax is a legislative act, and, unless authority is so given, it does not exist; also that the property to be taxed, as well as the mode of taxation, is subject to legislative control. *Cooley, Tax'n*, 244; *Pierce, R. R.* 81. A well-settled rule of statutory construction is that the intent of the legislature, if it can be ascertained, is to govern whenever doubts arise as to the meaning of words employed. Chief among the considerations to be weighed in the construction of a statute are the objects to be accomplished, the evils to be remedied, and the circumstances under which it was enacted. This rule is applicable to the construction of revenue laws. Special consideration has often to be given to the purposes to be effected, in order to correctly interpret laws of this character. *Cooley, Tax'n*, 198, 199. The purposes sought to be accomplished by this statute are apparent upon its face. They were to subject to taxation, by a mode convenient and equitable

to all concerned, the entire property employed by railway corporations in this state. A disposition is manifested, in the regulations prescribed, that no portion of the property so employed shall escape the burdens of taxation; that there shall be a just valuation of all articles; and that every division of the state entitled, shall receive a *pro rata* distribution of the revenues thus arising. This being the plain intent of the statute, a technical construction of an occasional word or phrase, which, if allowed, would tend to defeat the object, cannot be permitted. 1 Desty, Tax'n, 102.

Another consideration to be borne in mind is that the legislature has set off into a distinct class the property employed by these railway corporations, and the regulations prescribed for its valuation and taxation are exclusive of all others. The other sections of the statute cited by counsel, relating to local assessments of personal property, have no reference to any personal property employed as a portion of the equipment of a railway. *Railroad Co. v. Washington Co.* 30 Grat. 481.

We come now to the question of the respective jurisdictions of the county and state authorities. As we construe section 2251, the county officials are authorized to assess the real estate of these corporations, together with the improvements thereon, (not including any portion of the road itself,) situated in their respective counties, and they are likewise authorized to levy taxes upon their *pro rata* distribution of the entire assessment of the remainder of the property owned and used by the railways, the jurisdiction to *assess* which is conferred upon the state board of equalization. The entire road within the state, with all the rolling stock and personal property of every kind entering into its equipment, is to be assessed as a *whole*, and this is to be done by the state board. They are to value the road at a uniform rate per mile of main track, and add to the value of each mile a *pro rata* distribution of the whole valuation of the rolling stock and other personalty. On or before the fifteenth day of April in each year the board is required to transmit a statement to the county clerk of each county through which a railroad may run, showing the length of the main track in the county, and the assessed value per mile as fixed by the *pro rata* distribution per mile of all the property so assessed by the board. Upon this statement being transmitted, showing the proportion of such entire assessment to which each county is entitled, the county officials act, and levy taxes upon their *pro rata* distributions thereof. The legality as well as the advantages of this mode of assessment is recognized by numerous authorities. *State Railroad Tax Cases*, *supra*; *Applegate v. Ernst*, 3 Bush, 648; *Gulf R. Co. v. Morris*, 7 Kan. 210.

We next come to the objection, that the sleeping cars giving rise to this controversy are not required to be included in this entire assessment to be made by the state board, because, as alleged, it is only the property *owned* by the railroads which their officials are re-

quired to return for assessment; hence the jurisdiction of the board is confined to the property to be included in this statement. All other property, therefore, would be subject to *local* assessment, under *other* statutory provisions. We have already expressed the opinion that the mode of assessment prescribed by this section is exclusive of any other. It remains to consider the correctness of the allegation respecting the *return*.

We observe—*First*, that the articles in question comprise part of the rolling stock employed in the operation of these roads; *secondly*, that all the rolling stock and other personal property so employed, is to be assessed under the provisions of this section, and that the value of every article is to enter into the aggregate assessment to be prorated to the several counties; *thirdly*, that no jurisdiction is conferred by the section upon the county officials to assess property of this description; and, *fourthly*, that no other return to the board is provided for, save that by the railroad officials. The foregoing propositions are all sustained by the plain phraseology of the section.

That the assessment is to be as comprehensive as stated, is shown by the assessment clause, which is in the following words:

"The said property shall be valued at its full cash value, and assessments shall be made upon the entire railway within this state, and shall include the right of way, road-bed, bridges, culverts, rolling stock, depots, station grounds, buildings, and all other property, real and personal, exclusively used in the operation of such railway."

It is made the duty of the state board to make the entire assessment, save the real estate other than the road itself. Following the assessment clause above quoted, the further duties of the board respecting the *pro rata* distribution among the counties interested, for taxation of their respective proportions, are stated as above mentioned. Now the only officers or persons mentioned in the section upon whom is enjoined the duty of making returns to this board, concerning the rolling-stock and personal property aforesaid, are "*the president, vice-president, general superintendent, auditor, or other general officer of any corporation operating any railway in this state.*" And no returns of personal property are required to be made to any other jurisdiction than the state board. To so construe the statute as to excuse the railway corporations from returning to this board the entire rolling stock employed by them, because a portion of the articles were operated under contract, and not in fact owned by these corporations, would not only be inconsistent with the evident intention of the legislature, but tend to defeat it. The officers of the railroad companies possess the requisite information to make complete returns of every article used. They are familiar with every article comprising the equipment of their respective roads, and while some or all of such articles may in fact be owned by one or more non-resident persons or corporations, the statute very plainly makes it the duty of the railway officials to report the whole to the state board for taxation,

and as plainly excludes the idea of depending for returns on parties not connected with the management of the roads. This shows the legislative design to confer exclusive jurisdiction for the assessment of the property under consideration on the state board, and at the same time the want of jurisdiction in the county authorities. *Railroad Co. v. Washington Co.* 30 Grat. 481. Executive and ministerial officers enforce the tax laws, but in so doing they must keep strictly within the authority those laws confer. They neither have, nor can have, any "roving commission to levy and collect taxes from the people without authority of law, but can only do so in the manner prescribed by the law." *Barlow v. The Ordinary*, 47 Ga. 642.

We have not considered the question whether or not a liability to pay taxes on these sleepers exists against the railroad companies using them. That question is not properly before us, and neither of the railway companies interested in the question is a party to this controversy. But a construction of the provision relating to the *return of property* to be made by the railway officials is involved in the question of the jurisdiction of the county authorities to assess the taxes sued for, and has been necessarily passed upon.

Our conclusion on this branch of the case is that the statute imposes on the railway officials the duty of reporting to the state board all personal property employed by them in the operation of their roads, without regard to the question of ownership. The suggestion that the statute only requires return "of the rolling stock in use on the corporation's line which is *necessary* for the transportation of the freight and passengers," and that sleeping cars, being in the nature of a luxury and not a necessity, may be excluded, has no force whatever. It is reasonable to conclude that all the rolling stock used by a railroad company in the operation of a railroad is necessary for that purpose.

The views expressed and conclusions announced are decisive of this controversy. They show that the county authorities exceeded their jurisdiction in assessing and levying the taxes sought to be recovered, and that the judgment of the district court was correct. It will accordingly be affirmed.

Judgment affirmed.

(8 Colo. 298)

PUTNAM v. SEA.

Filed May 8, 1885.

1. PRACTICE—BILL OF EXCEPTIONS—EQUITABLE ACTION—EVIDENCE ON APPEAL.
Under the present practice in an equitable proceeding all matters *dehors* the record, including evidence, must be preserved by bill of exceptions.
- 2 EXCHANGE OF REAL ESTATE—DEEDS IN ESCROW.
On examination of the evidence, *held*, that it fails to show that plaintiff's deed was placed in the hands of a third party as an escrow, and delivered in violation of the agreement; and that plaintiff is not entitled to have such deed canceled, and a reconveyance decreed.

Appeal from the district court of Arapahoe county.

Broune & Putnam, for appellant.

Benedict & Phelps, for appellee.

HELM, J. This action was brought in equity to procure the cancellation of certain deeds to realty in Colorado, or a reconveyance of the property to plaintiff. Putnam, residing in this state, negotiated through one Reser with Sea, living in Illinois, for the exchange of titles to property in their respective states. Putnam's deeds to the Colorado property were delivered by Reser to Sea's agent, and a deed to the Illinois property was received in exchange therefor. Putnam declined to accept the latter deed, claiming that the terms of the exchange arrangement had not been complied with. The judgment in the court below turned upon the question as to whether Reser acted in the premises as Putnam's agent, and within the scope of his authority; or whether the latter's deeds were simply placed in the former's hands in pursuance of an escrow agreement, and delivered in violation thereof. It will be seen at once that the answer to this question must be drawn from the evidence.

In preparing the record before us, counsel evidently had in mind the practice prevailing in chancery cases prior to the adoption of the Civil Code. They assume that the evidence reported by the master, upon the filing thereof, became a part of the record, and that no bill of exceptions to incorporate the same was necessary. As a result, while the evidence is before us, we would be precluded from considering the same for any purpose. This court has held, in several cases, that, under the present practice, all matters *dehors* the record proper, of course including evidence, must be preserved by bill; and that this is true in equitable as well as legal actions. Appellee invokes the rule stated in these cases, and the objection is fatal to the review of this question.

There appears in the transcript a statement entitled "A Bill of Exceptions;" but it contains merely the motion to exclude certain testimony, and does not even set out the evidence referred to. Besides, it appears that this motion to exclude was filed and passed upon in the court below 24 days subsequent to the rendition of final judgment, and 18 days after the filing and approval of the appeal-bond; hence, prior to the presentation of appellant's motion, the district

court was entirely divested of jurisdiction to consider the question presented. But, inasmuch as title to valuable real estate is involved, we have examined the evidence, notwithstanding the objection aforesaid; and, if it will be any satisfaction to the parties, we are prepared to say that we would sustain the action of the district court upon the merits. In so doing we weigh all of the testimony bearing upon the so-called escrow arrangement. Much of this testimony was objectionable, being oral proofs of the contents of a letter. It was not the best evidence of the matter, and no proper foundation for its introduction was laid. But while counsel for appellee interposed appropriate objections before the master, upon the taking of this testimony, they entirely omitted, though given time so to do, to follow up these objections with exceptions to the master's report: Upon the proper and timely presentation of the subject to the district court, this testimony would, doubtless, have been excluded from consideration at the final hearing.

In view of the foregoing conclusions, it is unnecessary for us to discuss the principles relating to escrow deeds stated by counsel. Most of them are, doubtless, correct; but finding, as a question of fact, against the escrow theory, these principles are inapplicable.

The judgment will be affirmed.

SUPREME COURT OF NEVADA.

(19 Nev. 118)

ALT v. CALIFORNIA FIG SYRUP Co.

Filed May 29, 1885.

1. EVIDENCE—TESTIMONY AS TO VALUE—EXPERTS.

Witnesses may be allowed to give their opinions as to the value of services, not in the capacity of experts, but because the question is one of which the jury have no knowledge.

2. CONVEYANCE—CONSTRUCTION—SUFFICIENCY OF WORDS—MONEY INDEBTEDNESS.

In construing a particular conveyance involved in the case, whereby certain interests were transferred, *held*, that the phrases "all other property" and "other things" were not sufficient to convey an indebtedness due the grantors.

Appeal from a judgment of the Seventh judicial district court, Washoe county, entered in favor of the plaintiff, and from an order denying defendant's motion for new trial.

Thos. E. Haydon, for appellant.

R. H. Lindsay, for respondent.

BELKNAP, C. J. One of the objections in this case is founded upon the ruling of the district court, admitting in evidence the opinions of Alt, Thyres, and Levy, as to the value of the services rendered by the plaintiff in the preparation of a proprietary medicine called "Syrup of Figs." The process of manufacturing the compound is a secret known only to the plaintiff and one other person—an officer of the defendant corporation. In their preliminary examination the witnesses severally declared that they were conversant with the value of labor and services generally in the community in which the work in this case was performed, and that they knew of the extent and value of the services rendered by the plaintiff. The objection is based upon the competency of the witnesses as experts. They do not appear to have been offered as experts. The subject upon which they testified was, from its nature, one upon which expert testimony could not have been given. The reason for admitting expert testimony, as stated by Chief Justice SHAW, is that the expert, from his larger experience and more exact observation of facts, and the connection between appearances and their causes or results, is able to draw correct conclusions from circumstances which a man of ordinary knowledge and experience could not do. *Dickenson v. Fitchburg*, 13 Gray, 546.

The subject of inquiry in the present case was not beyond the knowledge of ordinary men. But witnesses are allowed to give their opinions on questions of value, for the reason that the subject may not have fallen under the observation of the jury, and the inquiry is allowed, to prevent a failure of justice. The opinion of witnesses acquainted with the value of land was received in the case of *Swan v. Middlesex*, 101 Mass. 173. In considering the competency of the evidence the court said:

"These opinions are admitted, not as being the opinions of experts, strictly so called, for they are not founded on special study or training or professional experience; but rather from necessity, upon the ground that they depend upon knowledge which any one may acquire, but which the jury may not have, and that they are the most satisfactory, and often the only attainable, evidence of the fact to be proved."

See, also, *Brady v. Brady*, 8 Allen, 101; *Anson v. Dwight*, 18 Iowa, 242; *Printz v. People*, 42 Mich. 144; S. C. 3 N. W. Rep. 306; *Continental Ins. Co. v. Horton*, 28 Mich. 173; Whart. Ev. § 447; Rog. Exp. Test. § 153.

Another objection is to the construction placed by the district court upon a deed made by plaintiff and others to the defendant corporation. Prior to the incorporation of the California Fig Syrup Company, the plaintiff, Alt, and others were the proprietors of the medicine, and of the appliances connected with its manufacture and sale. Alt owed his associates a balance of \$1,600 upon the purchase price of his interest. Upon the creation of the corporation they all joined in a deed of conveyance to it. It is claimed that the conveyance embraces this indebtedness. The deed, in the first place, conveys certain enumerated property, and then proceeds as follows:

"Also, the same undivided interest in all the machinery and means used in manufacturing said medicine, in the materials used, now belonging to them in such manufacture, in all such medicine now on hand or sold conditionally, and in the price of that sold or furnished and not yet paid for, in the bottles filled and unfilled, and in the mystery or art of compounding or manufacturing said medicine, and in all the other property, labels, circulars, and other things, rights or interests in or relating to such medicine, now belonging to said first parties," etc.

If the indebtedness of \$1,600 is conveyed at all, it is by the words "all the other property," and "other things." But we are of opinion that these words do not include, and were not intened to include, the indebtedness, because—*First*, the instrument of conveyance carefully designates the particular property conveyed, and so important a matter as this indebtedness would naturally have been mentioned if the intention had been to transfer it; and, *second*, the rule of construction is that general expressions, of the nature of those quoted, used in connection with enumerated matters and things, are limited to matters and things of the same kind. Thus the words "all the other property," and "other things," refer to property of the nature of labels and circulars. The clause, "rights or interests in or relating to such medicine," probably refer to the proprietary right and matters connected therewith; certainly it cannot be construed to include a debt due from Alt to the partnership. Sedg. St. & Const. Laws, 360; *St. Louis v. Laughlin*, 49 Mo. 562; *Grumley v. Webb*, 44 Mo. 444; *White v. Ivey*, 34 Ga. 186.

The judgment and order of the district court are affirmed.

SUPREME COURT OF ARIZONA.

(2 Ariz. 6)

BASHFORD and others v. KENDALL.

Filed May 25, 1885.

1. VERDICT—UNCERTAINTY—CANNOT BE CURED BY JUDGMENT:

When a verdict is bad for uncertainty, it cannot be corrected or cured by the judgment.

2. SAME—INCORPORATION OF, INTO JUDGMENT—EFFECT.

A verdict, when copied *verbatim* into the judgment, must be considered, on appeal, to be before the court, the same as if brought up on a bill of exceptions.

Appeal from Yavapai county.

John C. Herndon, for appellant.

Rush & Wells, Clark Churchill, and C. G. W. French, for respondents.

PINNEY, J. This was an action in ejectment for the recovery of a portion of lot 10, in block 8, situate in the city of Prescott and county of Yavapai, more particularly described as that portion of lot 10 lying immediately west of and adjoining that particular brick building situate on lots 9 and 10, in said block 8, and occupied by Bashford & Co. as a store, commencing at a point on the north line of Gurley street, in said city, at the south-west corner of said brick building; thence west, along and with the north line of said Gurley street, six inches, to the south-west corner of said lot 10; thence north, along and with the west line of said lot 10, 125 feet, to the north-west corner of said lot 10; thence east six inches to the north-east corner of said brick building; thence south, along and with the outer edge of the west wall of said brick building, 125 feet, to the place of beginning,—the same fronting six inches on said Gurley street, and running back, with a uniform width of six inches, 125 feet, to an alley.

The jury returned the following verdict: "We, the jury, find for plaintiffs, and give them two inches west of the brick wall;" on which verdict the court below entered up a judgment. The trouble with the judgment is that the verdict is too uncertain to justify it. The attempt is made to cure the defect in the verdict by the judgment. The jury might have been requested to retire and put their verdict in proper form, but where a verdict is bad for uncertainty, it cannot be corrected or cured by the judgment.

Since the decision in this case and before writing the opinion, a petition for rehearing was filed, in which it was claimed that, there being no bill of exceptions in the case, the verdict was not before the court. The petition for rehearing was denied. The verdict being copied *verbatim* into the judgment, must be considered before us, the same as if brought up by a bill of exceptions.

Judgment reversed, and new trial ordered.

HOWARD, C. J., and FITZGERALD, J., concurring.

SUPREME COURT OF CALIFORNIA.

(67 Cal. 77)

BARNETT v. COUNTY OF CONTRA COSTA. (No. 8,850.)

Filed May 28, 1885.

COUNTIES—LIABILITY FOR INJURIES FROM DEFECTIVE BRIDGE.

A *quasi* corporation, such as a county, in the absence of express statutory provision, is not liable for injuries caused by failure to keep a bridge under its control in repair.

Department 1. Appeal from the superior court of the city and county of San Francisco.

E. R. Chase, Flournoy, Mhoon & Flournoy, for appellant.

Naphthaly, Friedenreich & Ackerman and *L. Quint*, for respondent.

Ross, J. "In the United States *there is no common-law obligation resting upon quasi corporations, such as counties, townships, and New England towns, to repair highways, streets, or bridges within their limits, and they are not obliged to do so unless by force of statute. Even when the legislature enjoins upon corporations of this character the duty to make and repair roads, streets, and bridges, and confers the power to levy taxes therefor, the general tenor of the decisions is to treat this as a public and not a corporate duty, and to regard such corporations, in this respect, as public or state agencies, and not liable to be sued civilly for damages caused by the neglect to perform this duty, unless the action be expressly given by statute.*" 2 Dillon, Mun. Corp. § 996. Such is the rule in this state. *Sherbourne v. Yuba Co.* 21 Cal. 113; *Huffman v. San Joaquin Co.* Id. 427; *Crowell v. Sonoma Co.* 25 Cal. 313; *Winbigler v. Los Angeles*, 45 Cal. 36.

It is said for the plaintiff that the legislature, by section 50 of the act entitled "An act concerning roads and highways in Contra Costa county," (St. 1875-76, p. 237,) has made that county responsible in damages for injuries resulting from defective bridges therein. The section reads as follows:

"The county is responsible for providing and keeping passable and in good repair bridges and all public highways; and the supervisors must appoint semi-annually a special meeting, at which the road overseers, on days set apart for their respective districts, to hear highway and bridge reports and complaints from officers and citizens, when such orders must be made and such action had regarding the same as the public welfare demands."

It is not an easy matter to say exactly what this language does mean, but we are inclined to think that its effect—which is in harmony with previous provisions of the act—simply is to put upon the county, through its supervisors and road overseers, the responsibility and duty of keeping passable and in good repair all bridges and public highways within the county. It certainly does not say that the county shall be responsible in damages for a failure to keep the bridges in repair, nor, in our opinion, is such the effect of the language. v.7p,no.4—12

guage used. The rule that the county was not responsible for injuries in such cases was firmly established by the decisions in this state at the time the act in question was passed; and if the legislature had intended to alter it, it is to be presumed that it would have used appropriate language for the purpose. Certainly, it ought not to be held that an established rule of law has been changed by doubtful and ambiguous language.

Judgment and order reversed, and cause remanded.

We concur: MCKINSTRY, J.; MCKEE, J.

(67 Cal. 99)

PEOPLE v. CLARK. (No. 20,050.)

Filed June 2, 1885.

1. CRIMINAL LAW—FORMER JEOPARDY, WHAT CONSTITUTES.

Where a former information failed to charge the defendant with the commission of any crime, an instruction, on a trial under a subsequent information charging the defendant with burglary, that such former information did not constitute legal jeopardy, is proper.

2. EVIDENCE HELD SUFFICIENT TO JUSTIFY THE VERDICT.

In bank. Appeal from the superior court of the county of Santa Cruz.

The Attorney General, for respondent.

Z. N. Goldsby and *J. M. Lesser*, for appellant.

By THE COURT. The defendant pleaded not guilty as charged in the information; that he had been previously convicted of the same offense, and also once in jeopardy. The jury found, upon the plea of not guilty, the defendant guilty of burglary in the second degree, and on the other pleas found in favor of the people. Inasmuch as the former information failed to charge the defendant with the commission of any crime, the court below was justified in instructing the jury that the pleas of former conviction and once in jeopardy could not be sustained. The evidence was sufficient to justify the verdict of guilty of burglary in the second degree.

Judgment and order affirmed.

(67 Cal. 103)

PEOPLE v. MURRAY and others. (No. 20,079.)

Filed June 2, 1885.

CRIMINAL LAW—INFORMATION FOR ATTEMPT TO COMMIT BURGLARY—OFFENSE, HOW CHARGED.

An information for an attempt to commit burglary, a statutory offense, is sufficient if it charges the offense in the language of the statute.

In bank. Appeal from the superior court of the county of San Joaquin.

The Attorney General, for appellant.

J. H. & J. E. Budd, for respondent.

By THE COURT. The defendants were accused, by information, of the crime of attempt to commit burglary, a felony, committed as follows:

"The said John Murray and James Cunningham * * * did willfully, unlawfully, and feloniously attempt to willfully, unlawfully, and feloniously enter that certain room of," etc., "with the intent then and there, and therein, willfully, unlawfully, and feloniously to commit larceny."

The information was demurred to on the ground that it did not comply with sections 950-952, Penal Code, the first of which sections declares that the information must contain a "statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended;" *second*, that the facts stated do not constitute an offense; and, *third*, that the information does not state facts sufficient to constitute an offense. The demurrer was sustained.

According to Wharton, (1 Crim. Law, §§ 190-192,) the above statement of facts would not be sufficient according to the common-law rules; it was necessary to have stated the acts constituting the attempt. But, says Wharton, (section 191, above,) "where the legislature has by statute declared a particular act to be indictable, and provided that it shall be enough to describe such act in the statutory terms,—when this is done by direction or implication,—it is proper for the courts to hold, as has been done, that an indictment charging that the defendant did attempt to feloniously steal from the house of A. B., or to commit a rape on A. B., is good."

The statute of this state (Penal Code, 459) defines the crime of burglary, and section 664 declares that "every person who attempts to commit any crime," etc., is punishable, but does not declare what acts shall constitute an attempt. It has been frequently held by this court sufficient to state the offense charged in the language of the statute. Applying these rules to the information before us, it is sufficient.

The order is reversed, and the cause is remanded to the superior court of San Joaquin county, with directions to overrule the demurrer.

(67 Cal. 108)

MERCED Co. *v.* HICKS and others. (No. 9,572.)

Filed June 3, 1885.

1. APPEARANCE BY ATTORNEY—DEMURRER.

A defendant appears in an action when he answers, demurs, or gives written notice of his appearance, or when an attorney gives notice of appearance for him; but a defendant cannot be said to demur unless he does so in person, or by an attorney authorized to represent him.

2. ERROR WITHOUT PREJUDICE, IMMATERIAL.

Error without prejudice should be disregarded on appeal.

Department 2. Appeal from the superior court of the county of Merced.

Frank H. Farrar and Henry Edgerton, for appellants.

R. H. Ward, for respondents.

SHARPSTEIN, J. Summons was not served on any of the defendants in the above-entitled action. At the request of one of them, Hicks, an attorney, signed a demurrer which, on its face, purports to be the joint demurrer of all of them. The demurrer was overruled, no one appearing to sustain it, and a judgment by default was entered against all of the defendants. The defendants other than Hicks moved to vacate the judgment on the grounds that none of them had been served with a summons or had appeared in the action. The motion was granted, and from the order granting it this appeal is taken. As before stated, there was no service of summons on any of the defendants, and no appearance by any of the respondents in the action, unless the demurrer, which was filed by Hicks and signed at his sole request by an attorney, without any authority from respondents, constituted an appearance by them. We think there was no appearance by the respondents. "A defendant appears in an action when he answers, demurs, or gives written notice of his appearance, or when an attorney gives notice of appearance for him." Code Civil Proc. 1014. But a defendant cannot be said to demur unless he does so in person, or by an attorney authorized to represent him.

As none of the facts stated in the affidavit on which the respondents gave notice their motion would be based, were denied, we think the appellants were in no way prejudiced by the attorney who signed the demurrer being permitted to explain, under oath, how he came to sign it. The error, if it be one, could not, as we view it, affect the substantial rights of any of the parties, and therefore should be disregarded.

Order affirmed.

We concur: MYRICK, J.; THORNTON, J.

MERCED CO. v. HICKS and others. (No. 9,573.)

Filed June 3, 1885.

Department 2. Appeal from the superior court of the county of Merced.

The facts in this case and the points involved are similar to those in *Merced Co. v. Hicks*, (No. 9,572,) *ante*, 179.

Frank H. Farrar and Henry Edgerton, for appellants.

R. H. Ward, for respondents.

By THE COURT. The grounds upon which the order appealed from was made, are the same as in *Merced Co. v. Hicks*, (No. 9,572,) *ante*, 179, and on the authority of that case the order herein appealed from is affirmed.

Order affirmed.

(2 Cal. Unrep. 483)

MERCED Co. v. HICKS and others. (No. 9,599.)

Filed June 3, 1885.

JUDGMENT WITHOUT SERVICE OF SUMMONS OR APPEARANCE VACATED—PRACTICE ON.

Where a judgment is vacated because the defendants had not been served with summons, nor had appeared in the action, a refusal to make an order that the respondents should answer the complaint is not error.

Department 2. Appeal from the superior court of the county of Merced.

Frank H. Farrar and Henry Edgerton, for appellants.

R. H. Ward, for respondents.

By THE COURT. If, as we held in *Merced Co. v. Hicks*, (No. 9,572,) *ante*, 179, the order vacating the judgment against the respondents was properly made on the ground that they had not been served with summons or appeared in the action, it necessarily follows that the refusal to make an order that said respondents should answer the complaint was not error.

Order affirmed.

MERCED Co. v. HICKS and others. (No. 9,600.)

Filed June 3, 1885.

Department 2. Appeal from the superior court of the county of Merced. The facts and points involved in this case were the same as in *Merced Co. v. Hicks*, (No. 9,572 and No. 9,599,) *ante*, 179, 181.

Frank H. Farrar and Henry Edgerton, for appellants.

R. H. Ward, for respondents.

By THE COURT. The order appealed from herein is affirmed, on the authority of *Merced Co. v. Hicks*, (No. 9,599,) *supra*.

Order affirmed.

(67 Cal. 94)

CORCORAN and others v. MERLE and others. (No. 8,634.)

Filed May 30, 1885.

REDEMPTION OF MORTGAGED LANDS—BONA FIDE PURCHASER—EVIDENCE.

In proceeding for redemption of mortgaged lands against alleged purchaser, with notice of the equities of plaintiff, *held*, on a review of the evidence, that defendant purchased *bona fide*, for value, and without notice of said equities.

Department 2. Appeal from the superior court of the city and county of San Francisco.

John Lord Love and J. A. Waymire, for appellants.

R. R. Provines and E. J. Pringle, for respondents.

THORNTON, J. In this cause, which is an action to redeem certain lands from a mortgage, plaintiffs were, on motion of defendants, non-suited. The mortgage from which plaintiffs claim to redeem, was executed by Daniel Jones to Ann Reynolds, on the twelfth day of December, 1878, to secure an indebtedness of Jones to Ann Reynolds amounting to the sum of \$6,000, evidenced by Jones' note bearing date on the day last named, with interest, etc. Plaintiffs aver, with

a detail of explanatory circumstances, that Jones held the property for them, and as their trustee, and that defendant Merle purchased from Jones with full notice of their rights. They offer to pay the amount found to be due on the mortgage, after crediting the rents and profits received by Merle and Jones, who have been in possession for some time, during which they received rents from the property mortgaged. The defense of Merle, who is really the only defendant, is that he is a purchaser from Jones for a valuable consideration, without notice of any right of plaintiffs, or of either of them.

The facts shown in evidence are as follows:

On the twelfth of July, 1870, the plaintiff and his then wife, Mary, who were then the owners of the land involved in this litigation, borrowed of the Savings & Loan Society \$4,000, and to secure the loan and future advances not to exceed \$6,000, they on the same day executed a deed of trust to B. D. Dean and E. W. Burr, by the terms of which they granted and conveyed this land to the trustees in joint tenancy, and all the estate they then had or might in any way acquire to it. The deed of trust is in form such as is generally used by the society mentioned above. This deed was recorded July 16, 1870. In 1875, Mary Corcoran, above mentioned, died, leaving the plaintiff John her sole heir. In 1876 John married the plaintiff Annie. On the twenty-seventh of May, 1877, the plaintiffs executed a deed of trust to E. W. Burr and J. N. Shotwell to secure a loan of \$6,000, and future advances, not to exceed \$10,000, made to them by the society above mentioned. Both of these loans were evidenced by notes executed by the grantors above named, respectively, at the dates mentioned, to the Savings & Loan Society. On the eighteenth day of January, 1877, John Corcoran conveyed an interest in the land to his wife, the plaintiff Annie. On the twelfth of March, 1878, G. Raisch brought an action in the late Twelfth district court against the plaintiffs E. W. Burr, J. M. Shotwell, and H. P. Gallagher, executor of the last will of Mary Corcoran, deceased, to charge the land in question with the lien of a street assessment held by Raisch, in which a default was entered on the twenty-ninth of March, 1878, decree entered on the first of April, and sale regularly made under the decree to Raisch, on the second of May of the same year.

Just before the expiry of six months from the sale just mentioned to Raisch, the plaintiff John Corcoran entered into a negotiation with D. M. Seaton and Charles E. Pearson for the sale to them of the land incumbered as above set forth. It was agreed between John Corcoran, of the one part, and Seaton and Pearson, of the other, that the latter should pay off the indebtedness to the Savings & Loan Society, and the street assessment incumbrance, and pay John Corcoran \$2,500 in addition. An attorney was employed to prepare a deed of the property, by which John Corcoran should, on the above payments being made by Seaton and Pearson, convey to them the above-

mentioned land. The deed was drawn up and ready for signature, when, on the last day on which there could be a redemption from Raisch's judgment, one Daniel Jones, as a judgment creditor, filed a notice of redemption from the aforesaid sale under the Raisch judgment. Jones' was, or claimed to have, a right to redeem on a judgment before that time recovered in the municipal court of appeals. John Corcoran then refused to sign the deed. It appears that Jones was an instrument of T. P. Riordan and B. J. Shay, who put him in the position to redeem for them from the sale on the Raisch judgment. Shay and Riordan were using the name of Jones, who was a clerk in Shay's office.

The carrying out of the agreement between Corcoran, Seaton, and Pearson was broken off in this way. Corcoran was much embarrassed by the incumbrances on his property above mentioned, and, on the advice of Father H. P. Gallagher, applied to T. P. Riordan to help him out. The day before he (Corcoran) was to sign the deed to Seaton and Pearson, he met Riordan in the street, and the latter told him that he and his friend B. J. Shay could do better for him than he was doing in the trade with Seaton and Pearson; that they could either get the property free or get more money for him. Shay was present, and told him that Seaton and Pearson were Yankees and would swindle him; that he and Riordan were Irishmen, and if he (Corcoran) would stick to them, (Shay and Riordan,) they would see him all to rights, and that he would either get back his property or enough money to go back to Ireland and live in comfort all the rest of his life. Upon this, Corcoran went with Riordan to the office of the attorney and got the deed, which he had declined to execute on November 2, 1878. Before Corcoran had refused to sign the deed, Pearson had paid to the Savings & Loan Society all the money due it by the Corcorans; had taken from it an assignment of the promissory notes executed to it by the plaintiffs, and had obtained a reconveyance to John and Mary Corcoran by Burr and Dean, trustees, under the deed of July 12, 1870. This deed was recorded on the twenty-ninth of January, 1879. Seaton, finding out that Jones was acting for Shay, opened negotiations with him, and discovered that Shay and Riordan were working together to secure the property. Seaton had frequent interviews with Shay and Riordan, and it was finally agreed between them that the property should be conveyed to John S. Barrett, as trustee, to hold for 30 days, and then convey it to Seaton and Pearson, unless within that time Shay and Riordan should pay Barrett for them \$6,000, and in case they paid that sum, that then Barrett should convey to any one they might name. At the suggestion of Shay, Pearson requested Burr and Shotwell, trustees, to advertise the property for sale. They did so, and it was sold on the fourth of December, 1878, to John S. Barrett for \$6,500. There was in fact, no money paid, and Barrett was not personally a bidder at the sale. Seaton bid it off in Barrett's name, and the property was knocked

down to him at the sale. December 5, 1878, Burr and Shotwell, trustees under the deed of May 21, 1877, for the consideration of \$6,500, conveyed to John S. Barrett all the estate they had derived under the trust deed aforesad. About that time a sheriff's deed was made to Pearson, who had procured an assignment of the certificate of sale from Raisch, and, by Pearson, was assigned to Barrett. On the twelfth of December, 1878, Barrett received from Shay and Riordan \$6,000 for Seaton and Pearson, and on the same day Barrett executed a deed conveying the property to Daniel Jones. This deed expressed a consideration of \$20,000. Barrett paid the \$6,000 over to Seaton and Pearson. On the twelfth of December, 1878, Daniel Jones mortgaged the property to Ann Reynolds for \$6,000. On the twenty-ninth of January, 1879, the deed from Barrett to Jones was recorded.

Such was the state of the title when the defendant Merle purchased of Daniel Jones. The deed of conveyance from Jones to Merle, of the land involved in this suit, bears date of July 3, 1879. Merle testified that before and at the time he paid the money to Jones for the property, and received the deed, he knew nothing of the transactions between Shay, Riordan, and Corcoran, or between Seaton and Pearson and Corcoran, or between Shay and Riordan and Seaton, or Pearson, or any of them, and there is no testimony contradicting this statement. The payment of the purchase money by Merle on the day of the execution of the deed is established by clear and uncontradicted evidence. We find nothing in the documentary evidence in the case to put Merle on inquiry as to these transactions. There was no legal title outstanding in Burr and Dean, trustees under the deed of July 12, 1870, at the time Merle purchased. It had been got in on November 2, 1878, by a deed of release to the plaintiff John Corcoran and Mary Corcoran, and was recorded on the twenty-ninth of January, 1879, months before the date of the deed to Merle. As soon as the release above mentioned was made by Burr and Dean, on the second of November, 1878, it passed at once by operation of the trust deed to Burr and Shotwell to them, the grantees in the last trust deed; for it must be remembered that the deed last referred to conveyed to the trustees all the title which the grantors then had or might afterwards acquire. If Mary Corcoran was dead in 1878, when the deed of release was executed to John and Mary Corcoran, the whole interest passed to John Corcoran.

We do not think it material that Dean was not made a party to the action brought by Raisch. If, in consequence of this, some portion of the title conveyed to Burr and Dean remained in Dean, we do not see why that interest could not be released to John Corcoran, which would pass as above stated to Burr and Shotwell. If he was not a necessary party to the suit of Raisch, then the whole title passed to the purchaser at the sheriff's sale on the Raisch judgment, and the sheriff's deed made thereunder, and this title was conveyed to Jones.

In either case the full legal title had passed to Jones long before Merle purchased. The court ruled correctly in finding that Merle was an innocent purchaser, and in ordering a nonsuit.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MYRICK, J.

(87 Cal. 100)

ROSE v. FELDMAN. (No. 8,990.)

Filed June 1, 1885.

GUARANTY—SUFFICIENCY OF COMPLAINT ON.

In an action on a guaranty, a complaint does not state a cause of action against an individual, if, from the copy of the guaranty set out in the complaint, it appears that the same was executed by a firm of which he was a member, and not by himself in his individual capacity.

Department 2. Appeal from the superior court of the city and county of San Francisco.

F. A. Berlin, for appellant.

A. C. Adams, for respondent.

SHARPSTEIN, J. The plaintiff alleges in his complaint that he leased certain premises for a specified period to one Ardrey for the sum of \$600, and that the defendant guarantied the payment thereof. The complaint contains what is alleged to be a copy of the guaranty, and it is signed "L. FELDMAN & Co." Whether that, in connection with the allegations that the defendant, "at the time of said hiring and letting of said land and premises, then and there agreed in writing, to and with said plaintiff, to guaranty to him, said plaintiff, the payment of said \$600," and that "the said guaranty of said defendant for the payment of said \$600 rent was then and there written and duly signed by said defendant," is sufficient to render the defendant *individually* liable for said rent, is the principal, if not the only, question which we have to consider on this appeal.

Does it sufficiently appear by the allegations of the complaint that the defendant was the guarantor? If so, the demurrer was properly overruled; otherwise, it should have been sustained. The complaint does not show that there was not such a firm as "L. Feldman & Co.," or that the defendant was not authorized to write and sign said guaranty for said firm; or that the defendant did business in the name of "L. Feldman & Co." Consistently with the allegations of the complaint there might have been such a firm, and the defendant might have been authorized to write and sign for it the guaranty sued on in this action. If a copy of the guaranty had not been incorporated in the complaint, it would sufficiently appear that the defendant was the guarantor. But the written guaranty does not purport to be his, but that of "L. Feldman & Co." If the copy had been omitted, and the allegations of the complaint denied, could the plaintiff have introduced that guaranty in evidence? We think not. And if not, it is quite

clear that the complaint does not state facts sufficient to constitute a cause of action. In other respects we think the complaint sufficient.

Judgment reversed, with directions to the court below to sustain the demurrer, with leave to the plaintiff to amend within 10 days after being notified thereof.

We concur: THORNTON, J.; MYRICK, J.

(57 Cal. 102)

In re WHITE. (No. 20,082.)

Filed June 2, 1885.

CONSTITUTIONAL LAW—SAN FRANCISCO LAUNDRY ORDINANCE, VALIDITY OF.

An ordinance of the city and county of San Francisco, providing that all buildings used as laundries within its corporate limits shall be constructed in a designated manner, is within the constitutional power of the board of supervisors.

Department 2. Application for *habeas corpus*, for release from arrest for violation of the ordinance mentioned in the opinion.

A. C. Searle, for petitioner.

Alfred Clarke, for respondent.

SHARPSTEIN, J. The petitioner bases his right to a discharge on two grounds: (1) The unconstitutionality of order 1,559; and (2) that it was repealed by orders 1,719 and 1,767. Order No. 1,559 contains two sections:

"Section 1. All buildings erected and used as laundries, within the corporate limits of this city and county, on and after March 1, 1880, shall be constructed but one story in height, with brick or stone walls not less than twelve inches in thickness, covered with a metal roof, and provided with metal, or metal-covered, doors and window shutters.

"Sec. 2. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment."

We do not doubt the constitutional power of the board of supervisors to pass such an order, or of the municipal authorities to enforce its observance. Const. art. 11, § 11; *Barbier v. Connolly*, 113 U. S. 27; S. C. 5 Sup. Ct. Rep. 257; *Soon Hing v. Crowley*, 113 U. S. 703; S. C. 5 Sup. Ct. Rep. 730. Neither order 1,719 nor 1,767 is inconsistent with or repugnant to order 1,559, nor is the object of either of the former the same as that of the latter. The object of the latter is to prohibit the use of buildings for laundry purposes which are not constructed of the materials and in the manner therein prescribed. Neither of the other orders contains any provision on that subject. Under such circumstances a repeal cannot be implied.

Writ dismissed and petitioner remanded.

We concur: THORNTON, J.; MYRICK, J.

(67 Cal. 110)

CITY AND COUNTY OF SAN FRANCISCO v. MCGINN. (No. 8,933.)

Filed June 3, 1885.

TAXATION—LIABILITY OF IMPROVEMENTS ON LEASED CITY LANDS.

Improvements on lands leased from an incorporated city and county, erected by the lessee, are, for the purpose of revenue, his property, and liable to taxation.

Department 2. Appeal from the superior court of the city and county of San Francisco.

W. C. & I. G. Burnett, for appellant.

Wm. Craig and John Lord Love, for respondent.

MYRICK, J. This is a tax-suit; the defendant claiming that no taxes on the property can be recovered of him. The city and county of San Francisco, in 1875, under the act of March 30, 1875, leased to defendant a portion of the school lot belonging to the city and county, located at the corner of Market and Fifth streets. The defendant took possession of the leased land, and made improvements and erected a substantial four-story frame building, with brick foundation, attached to the soil. For the fiscal year 1881-82 the building and improvements were assessed to defendant, and this suit is to recover the taxes. The defendant insists that he is not liable for the taxes, because, he says—*First*, the city and county owns the realty, the improvements and building are portion of the realty, and therefore not his property; and, *second*, section 3887, Pol. Code, as in force at the date of the lease, declared that the "lessor of real estate is liable for the taxes thereon," and the city and county, being liable, cannot recover of him.

It is not necessary to follow and answer in detail the various reasons given by defendant why he should not be held liable; it is sufficient to say that, for the purposes of revenue, the legislature of this state has observed a distinction between real estate and improvements, and that distinction has been recognized by this court.

Section 3607 of the Political Code, as in force in 1875, declared that property of municipal corporations was not subject to taxation. If, as contended, the building and improvements were portion of the realty and thus held exempt, the provision of the constitution of 1863, as to uniformity of taxation, might be evaded.

We are of opinion that, for the purposes of revenue, the defendant was the owner of the property assessed, and that he is liable for the taxes.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(2 Cal. Unrep. 483)

AH GOON v. TARPEY and others. (No. 8,633.)

Filed June 3, 1885.

ALLEGATION AND PROOF—IMMATERIAL VARIANCE.

Reversal is not warranted by variances between allegations and proof which are immaterial, if no one is misled thereby.

Department 2. Appeal from the superior court of the city and county of San Francisco.

A. A. Moore and Moore & Reed, for appellants.

T. C. Van Ness, for respondent.

By THE COURT. 1. The difference in the names Ah Yak and Ah Jack; also as to whether the men were employed to be paid one dollar, or a dollar and a quarter, or a dollar and a half; and the statement in the assignment that the contract was with the Melrose Smelting & Refining Works,—if variances, were immaterial, and misled no one. Section 469, Code Civil Proc.

2. The court did not err in striking out that portion of the answer relating to garnishment; it contained no defense to the action stated in the complaint.

Judgment and order affirmed.

(2 Cal. Unrep. 484)

O'CONNOR and others v. FLYNN. (No. 8,947.)

Filed June 3, 1885.

ERROR WITHOUT PREJUDICE, IMMATERIAL.

Reversal is not warranted by error which is favorable to the appellant.

Department 2. Appeal from the superior court of the city and county of San Francisco. The decision on a prior appeal is reported in 57 Cal. 293.

Sawyer & Ball and M. G. Cobb, for appellants.

Jos. W. Winans, for respondent.

SHARPSTEIN, J. On the former appeal this court directed the court below to order an accounting, and with great minuteness directed in what manner the account should be taken. From that direction the only deviation which we have been able to discover was made in the interest of appellants.

Judgment and order affirmed.

We concur: MYRICK, J.; THORNTON, J.

McGEE v. CITY OF SAN JOSE. (No. 8,203.)¹

Filed May 28, 1885.

CONTRACT FOR PUBLIC WORK IN SAN JOSE—MANNER OF PAYMENT FOR WORK.

Where a contractor agreed to do public work for the city of San Jose, and that the terms of payment therefor should be in accordance with the act of March 17, 1874, (Cal.) reincorporating said city, and, subsequent to entering into said contract, such act was amended so as to provide that laborers and material-men, for such work, shall, within a specified time after acceptance of the work, present their claims to the city clerk, and, if the same are undisputed, shall be paid therefor from the amount due the contractor, and laborers and others under such contractor did file their claims as so provided, and the plaintiff contractor indorsed them as correct, with the exception of certain of said claims which he disputed, and the allowed claims were so paid, and the balance due contractor (with the exception of an amount sufficient to satisfy the disputed claims if they should prove good) was paid to him, such statutory amendment thereby became part of such contract, and plaintiff, by so indorsing such claims, authorized the city to pay them, and waived his right to receive the money therefor; and the city, by paying said claimants and retaining such balance to abide a contest as to their validity, was discharged from further liability on such contract.

Department 1. Appeal from the superior court of Santa Clara county.

Houghton & Reynolds, for appellant.

D. W. Herrington, for respondent.

McKEE, J. The plaintiff in the action in hand claims that he entered into a contract with the city of San Jose to grade, gravel, and curb, according to certain plans and specifications adopted by the common council of the city, one of its public streets, and to satisfactorily complete the same on or before the first day of February, 1878, for which the city promised to pay him, after acceptance of the work, the sum of \$3,400. In his complaint he avers that the work was completed to the satisfaction of the city, and that the city accepted the same, but refused to pay therefor the compensation provided by the contract, or any part thereof, except a certain sum, which, being allowed, there remains a balance due and unpaid, for which he demands judgment. In its answer to the complaint the city admitted that the contract was executed as set forth in the complaint, but it denied that it "obligated itself" to pay for the same, and averred that it had fully performed the contract on its part according to the charter.

At the trial it was admitted that the officer by whom the contract was executed on the part of the city was the qualified street commissioner of the city of San Jose; that, as such officer, he had authority to execute, and executed, the contract in suit; that the contract was, after it had been made by the officer, approved and confirmed by the city in the mode prescribed by the charter; that the work contracted for was completed, not within the time fixed by the contract, but within time extended for that purpose by the common council of the

¹ Reversed in banc. See 8 Pac. 41, 68 Cal. 91.

city; and that, after the work was completed, the city approved of the same and accepted it.

Upon these admissions the plaintiff was entitled to receive for his work compensation according to the terms of the contract under which he had performed it, for the contract was within the scope and powers conferred on the city by its charter. In the exercise of these powers, the common council, in its own discretion, or upon the petition of three-fifths of the owners of the property fronting on any street of the city to be improved, could order the improvement of the street to be made, according to plans and specifications of its approval and adoption, and direct the street commissioner of the city to contract with the lowest responsible bidder for the performance of the work, and, after approval of the contract, which the commissioner might make, it could provide for the cost of the work by assessments upon the real property fronting on the street, enforce collection of the same, and have it paid into the general fund of the city treasury to meet the cost and expenses of the improvement. Sections 19, 21, Charter of San Jose.

Assuming, therefore, the facts as admitted at the trial, that the contract in suit was authorized, approved, and confirmed by the council; that the contractor had, in performance of it, completed the work, and that the city had accepted it,—the legal presumption arose that all the steps prescribed by the charter, by which authority was given to enter into the contract, were taken to make the authority effectual, and that the authority was exercised by the officials of the city in a legal and authorized manner, (*Argenti v. San Francisco*, 16 Cal. 282;) and as the work was performed to the satisfaction of the city, and the city accepted it, the contractor was entitled to receive the compensation, and the city became liable to pay it, according to the terms of the contract. It is well settled, "when the legislature has invested the corporation with the power to improve streets, and raise the money to pay the costs of such improvement by an assessment, and persons have, on the faith of this power and the stipulations of the corporation, performed the contract, and the contractor has become entitled to the consideration, there is a contract obligation to pay, valid in all respects, that may be enforced." *Argenti v. San Francisco*, *supra*; *Goodale v. Fennell*, 27 Ohio St. 426. And the city is liable to pay, under its contract, to the same extent and in the same manner as a private corporation or a natural person. Dill. Mun. Corp. § 749.

Now, the contractual obligation assumed by the defendant was contained in the following terms of the contract, namely:

"In consideration of said work the party of the second part (that is to say, the contractor) shall be entitled to receive, have, and recover from the city of San Jose the said sum of \$3,400,—70 per cent. in gold and 30 per cent. in silver,—in the manner prescribed by law, and in accordance with an act of the legislature of the state of California, entitled 'An act to reincorporate the city of San Jose, approved March 17, 1884.'"

The obligation of the city was, therefore, to pay in the manner prescribed by the charter. At the date of the contract section 22 of the charter read as follows:

"If the work shall be accepted by the commissioner of streets, the city engineer, and the chairman of the street committee, the mayor and common council shall, at the next regular meeting after said acceptance, draw a warrant upon the general fund in favor of the contractor for the amount due upon such contract; but no warrant shall be drawn or liability created until such written acceptance is duly filed."

But on the thirtieth of March, 1878, the section was amended as follows:

"Whenever any such work is accepted, the city clerk shall, upon the filing of said certificate of acceptance as aforesaid, give notice thereof by publication for five consecutive days in some daily newspaper, printed and published in the city of San Jose. Said notice shall state the amount due by said city for said work, and that warrants will be drawn for the payment of the same at the next regular or special meeting of the mayor and common council, and that within said time all laborers or persons furnishing materials,—performing labor or furnishing materials used in the performance of the contract for the improvement of such street,—may file with the city clerk a statement of their claims for labor or materials so furnished; and if said accounts or statements so filed are undisputed by the contractor, warrants shall be drawn therefor, in favor of the persons presenting such claims, to the extent of the contract price, or so much thereof as may then be due said contractor from said city. If the aggregate of the claims so filed with the city clerk amounts to more than the contract price for said work, or the amount then due from said city to said contractor, then, and in that case, the warrants shall be drawn in favor of the persons filing said claims, so that each person shall receive his *pro rata* share of the amount due the contractor from said city, and said payments shall be made to such persons so filing claims in preference to any claim due to said contractor, or to any assignee from him. If said claims so filed, or any one of them, are disputed by said contractor, the amount thereof shall be retained by the city treasurer until the same shall be adjudicated in a court having competent jurisdiction. All warrants under this section shall be drawn on the general fund, but no warrant shall be drawn, or liability created, until such written acceptance is duly filed."

Written acceptance of the work was filed, as prescribed by the charter, on the twenty-ninth of July, 1878. On that day the liability of the city accrued, and, under the provisions of the charter, the city undertook to discharge its obligation. For that purpose it caused notice to be given, as required by the charter, and, pursuant to the notice, certain assignees of the contractor, and some laborers, subcontractors, and material-men, who had done work for and furnished the contractor with materials, which he used in the performance of his contract, filed claims for the amount of \$——. Of these claims, those of the assignees, and 12 of the claims of laborers, subcontractors, and material-men, were undisputed. The contractor examined the 12 claims, and under his own signature indorsed each one "correct." The others he disputed. The undisputed claims were allowed by the council, and ordered paid; the disputed claims were not allowed. Upon the allowed claims warrants were issued to the claim-

ants for the sum of \$1,423.75, which were presented to the treasurer and paid. Warrants were also issued to the contractor himself for the sum of \$1,513.05, which were paid. These payments left due a balance of about \$700, which the council ordered to be retained in the city treasury to abide the judicial determination of an action which, the contractor admitted, was pending between some of the disputed claimants and himself.

By examining and indorsing as "correct" the undisputed claims filed against him, we think the contractor himself authorized the city authorities to pay them to the claimants, and waived his right to receive the money therefor, and that in paying them to the claimants, and in retaining the balance in the city treasury to abide the adjudication of proceedings pending between the disputed claimants and the contractor, the city discharged its liability upon the contract; for the charter was a part of the contract. The contractor knew that the city, in the execution and performance of the contract, could act only according to the corporate powers conferred upon it for those purposes, and he contracted to do the work knowing that he could only receive compensation for it from the city in the manner prescribed by the charter; and as compensation was awarded to him in the manner prescribed by the charter under which the work was completed, there was no enforceable liability against the city upon the contract.

Judgment and order affirmed.

We concur: ROSS, J.; MCKINSTRY, J.

(67 Cal. 89)

MYERS v. REINSTEIN and others. (No. 8,730.)

Filed May 29, 1885.

RESULTING TRUST, ACTION TO ESTABLISH—EVIDENCE.

In an action against the representatives and devisees of an alleged trustee, to establish a resulting trust in land, by an assignee, the assignor and alleged original *cestui que trust* may testify as to transactions between himself and the trustee prior to the death of such trustee; and, such action not being based on a claim or demand against the estate of a decedent, such evidence is not made inadmissible by statute. Section 1880, Code Civil Proc. Cal.

Department 2. Appeal from the superior court of the city and county of San Francisco.

J. B. Reinstein, for appellant.

Horace Haws, for respondent.

THORNTON, J. This action was brought to establish a resulting trust in a parcel of land claimed to have been purchased by S. H. Collins and M. Reinstein,—the latter, testator of defendants O. Reinstein and A. Vaenberg,—when partners, and paid for with partnership funds. The parcel had been conveyed to M. Reinstein. The action

was brought by plaintiff as the assignee of Collins. Judgment passed for plaintiff. Defendants moved for a new trial, which was denied, and they prosecute this appeal from the judgment and order denying the new trial.

Collins, as stated above, the assignor of plaintiff and the partner of M. Reinstein, who had departed this life before the commencement of this action, was called as a witness and sworn. He had testified that he was the person named as S. H. Collins in the complaint; that he resided in San Francisco, and had business transactions with M. Reinstein in his life-time. When this question was put to him by plaintiff's counsel, "What transactions did you have with him?" at this point an objection was made by counsel for defendants, as follows:

"Defendant objected to any testimony on the part of the witness Collins as to such transactions with said Marcus Reinstein, against the executors of said Marcus Reinstein, on the ground that the evidence is incompetent, irrelevant, and immaterial, and specially excluded by section 1880 of the Code of Civil Procedure of the state of California; it appearing from the amended complaint herein, and not denied in the answer, that said Collins is the plaintiff's immediate assignor of the premises in controversy, and the said Marcus Reinstein died before the filing of the complaint herein."

The objection was soon afterwards renewed, substantially, by defendants, as to any testimony of the witness relative to transactions had with Reinstein prior to his death. The objection was overruled. The witness testified fully in relation to transactions of the character referred to in the objection. An exception was reserved by defendants, and the ruling is now urged as error.

We think the objection was so taken as to raise the question of the competency of Collins to testify as to any transaction occurring before M. Reinstein's death. Collins was not a wholly incompetent witness; his incompetency, if any, was a qualified one. He was at any rate competent to testify to any matter relevant to the issues in the cause, occurring subsequently to Reinstein's decease, and in fact some of his testimony was of this character. The objection referred to section 1880, Code Civil Proc., as rendering him incompetent to testify to the matters covered by the objection. We think this reference, with the other portions of the objection, sufficiently informed the court and the defendants that the objection was to the competency of Collins to the matters specifically referred to by counsel for defendants. The points presented in the form of words adopted by defendants' counsel in stating his objection, was beyond an objection that the testimony of the witness was incompetent, immaterial, and irrelevant. The court below so understood it, and we think it understood it properly. The objection was properly taken *in limine*, before the witness had given any testimony which was within the objection.

The question remains for determination, was Collins a competent witness as to the transactions objected to? If he was not, the court

committed an error affecting materially the interests of defendants. If he was competent, there was no error. The objection is based on section 1880, Code Civil Proc. That section, so far as relates to the question before us, is as follows:

"The following persons cannot be witnesses: * * * (3) Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person."

We are of opinion that the witness was competent. The action was not on a claim or demand against the estate of Reinstein. The plaintiff asserted that the interest in the land sued for constituted no part of M. Reinstein's estate, but was held in trust by Reinstein for Collins or his assigns, and, after his death, by the defendants, his devisees and successors. The defendants asserted that no such trust existed, but that Reinstein, their deviser, held the lands as his own estate, and that they had succeeded to his right. The very question to be determined here was whether the interest sought to be recovered was a part of Reinstein's estate or not. If it was a part of his estate, then no trust existed; if the trust existed, he held it in trust in his life-time, and the interest passed to his successors to the legal title, clothed with the trust. To hold that the claim or demand here attempted to be enforced was a part of the estate, and thus render the witness incompetent, would be to determine in advance the very question to be determined on the trial of the action. By so holding we would assume the very question to be tried and settled by the contestation between the parties. This we are not allowed to do. It may be admitted, though we are not now willing to concede it, that it would be, as an abstract question, unjust that Collins should be allowed to testify in the cause while Reinstein's lips are sealed by death. But this was a question for the consideration of the legislature, to be settled by it, and it has not, as we construe the language used by it in framing the section invoked, thought proper to go so far as to apply the rule prescribed by the section to all actions brought against an executor or administrator. The section of the statute in New York is much broader in its language (section 399 of the New York Code of Procedure; see Voorhies' Code, Ed. of 1870, p. 626) than that of this state. Our attention has been called to no act or case construing it in any other state where the form of words used in the statute is the same as that adopted in section 1880, Code Civil Proc.

We have looked into the cases of *Fullon v. Butler*, 21 Cal. 24, and *Estate of McCausland*, 52 Cal. 568, cited by counsel, but they throw little, if any, light upon the question herein discussed. We refer to them to show that they were not overlooked in considering this case. The evidence of Collins was neither incompetent, irrelevant, nor immaterial, and the testimony in the case was of a character sufficient to establish the trust as claimed by plaintiff.

It follows that the judgment and order must be affirmed; and it is so ordered.

We concur: MYRICK, J.; SHARPSTEIN, J.

(87 Cal. 83)

KUTZ v. FLEISHER. (No. 8,715.)

Filed May 29, 1885.

1. STOCKBROKERS—PAROL AGREEMENT TO BUY AND SELL STOCKS.

An agreement between stockholders by parol, whereby one is to buy and sell stocks for the account of the other, and for such purposes to make advances of money, and pay assessments on the stocks bought, is a valid agreement.

2. OPEN ACCOUNT—ACCRUAL OF ACTION ON.

The time of accrual of an action to recover a balance due on a mutual open and current account, where there had been reciprocal demands between the parties, is, from the date of the last item, proven in the account on either side.

Department 2. Appeal from the superior court of the city and county of San Francisco.

Carl T. Graef, for appellant.

Naphthaly, Freidenrich & Ackerman, for respondent.

THORNTON, J. We find no error in this record. It was not a case of a sale of personal property by a vendor to a vendee, but of a broker (plaintiff) purchasing and selling stocks for account of another, (defendant,) advancing money for the purpose, and paying assessments on the stocks purchased. The whole transaction was had under an agreement entered into in advance of the purchases being made. It was no part of the terms of the agreement that it was not to be performed within one year from the making thereof. On the foregoing facts, it follows that section 26 of article 4 of the constitution; sections 1624, subds. 1, 4, Civil Code; section 1973, subds. 1, 4, Code Civil Proc.,—have no application in this case.

The agreement as enforced could be made by parol, and therefore section 1739, Civil Code, has nothing to do with the case. The claim of interest at $1\frac{1}{2}$ per cent. per month was withdrawn. The verdict is not against law, nor is it unsustained by the evidence. It might be improved as to the form, but it is sufficiently certain, and is within the issues. The evidence on which one verdict as to that part of plaintiff's claim, styled in the verdict "stock account," consists of an account mainly between plaintiff and defendant, all of which grew out of buying and selling stocks under the agreement above stated. This sufficiently explains the use of the words "stock account" in the verdict. Granting that a stated account was not proved, a recovery might be sustained on the counts for money lent and money paid.

The cause of action was not barred by the statute of limitations. The action is really one to recover a balance due on a mutual, open, and current account, where there had been reciprocal demands between the parties, and in such case the cause of action accrues from the time of the last item proved in the account on either side. The

account was proved, and the last item recoverable in this action, on the credit side of the account, bears date twenty-eighth day of January, 1882, and on its debit side, November 17, 1881. The cause of action in this case could only be barred in three years from its accrual. The action was commenced on the twentieth day of March, 1882. It follows that, computing from either of the above-mentioned dates of last items, the action was not barred. The court committed no error in refusing the requests for instructions preferred by counsel for defendant. They referred to matters not in the case.

The judgment and order must be affirmed. So ordered.

We concur: MYRICK, J.; SHARPSTEIN, J.

(87 Cal. 106)

PALMER v. SNYDER. (No. 9,547.)

Filed June 2, 1885.

JURISDICTION OF JUSTICE'S COURT IN SAN DIEGO—CHANGE OF PLACE OF TRIAL.
Under the California statute of 1875-76, reincorporating the city of San Diego, an action properly brought before a justice of the peace of such city may be transferred for trial before a justice whose office is outside of the city. The general statute as to change of place of trial is applicable to such cases. Code Civil Proc. Cal. §§ 833-835.

In bank. Appeal from the superior court of the county of San Diego. The appeal is taken from a judgment granting a writ of mandate to compel the trustees of San Diego city to audit plaintiff's claim, based on a judgment in a justice's court.

E. W. Hendrick, for appellant.

Works & Titus and Conklin & Hunsaker, for respondent.

By THE COURT. 1. The appellant claims that the justice of the peace of National township had no jurisdiction of the case, and that a judgment rendered by any justice having his office out of the city of San Diego, in a case under section 12 of the act to reincorporate the city of San Diego, is void. St. 1875-76, p. 812. The act does not say that a judgment shall not be recovered before any justice out of the city. The action was properly brought before a justice of the city, and, at the special instance and request of the city, was transferred to a justice of National township, in the same county. We think the latter justice had jurisdiction. There is nothing in the act referred to, to show that sections 833 and 835, Code Civil Proc., are not applicable to this case, as to change of place of trial.

2. We find nothing in the act which shows error in the order that the defendants, the board of trustees, audit and allow plaintiff's claim and issue warrant therefor.

Judgment affirmed.

(67 Cal. 111)

HORSWELL v. RUIZ. (No. 9,893.)

Filed June 3, 1885.

1. LOCATION OF MINING CLAIMS—RIGHT TO POSSESSION.

A party who goes upon United States mineral lands, and, without complying with the requirements of the law, or of any federal, district, or local custom, works thereon, and relies exclusively on his possession and work, is not entitled to the possession as against another party who subsequently peaceably locates a mining claim covering the same ground, and complies in all respects with the requirements of the federal and district mining laws, rules, and regulations; and the former is a transgressor from the time such second party has perfected his location and complied with the law.

2. SAME—BOUNDARY OF CLAIM.

The provision of the mining laws requiring the lines of each claim to be parallel to each other is merely directory, and no consequence attaches to a deviation from such provision.

Department 2. Appeal from the superior court of the county of Los Angeles.

Howard & Roberts, for appellant.

Smith & Hupp, for respondent.

SCHARPSTEIN, J. The instructions given at the request of the defendants in some instances contradict those which were given at the request of the plaintiffs. For example, one instruction, given at plaintiffs' request, reads:

"You are instructed that if a party goes upon the mineral lands of the United States and works thereon, without complying with the requirements of any law, either federal, district, or local customs, and relies exclusively on his possession or work, and a second party locates peaceably a mining claim covering the same ground, and in all respects complies with the requirements of the federal and district mining rules, laws, and regulations, then such second party is entitled to the possession of such mineral ground as against the party in prior possession, who is, from the time said second party has perfected his location and complied with the law, a transgressor."

At the request of defendants the following was given:

"The jury are instructed that, independently of any mining laws or customs, a party who first takes possession of an unclaimed mineral lode for mining purposes, may hold the same by actual work and occupation, to the extent of such work and occupation, as against all the world, except the paramount proprietor, provided that he neither claims nor holds in excess of that to which he would be entitled by virtue of a compliance with the mining laws."

The law is correctly stated in the one first given. *Morenhaut v. Wilson*, 52 Cal. 263; *Chapman v. Toy Long*, 4 Sawy. 28; *McCormick v. Varnes*, 2 Utah, 355; *Belk v. Meagher*, 104 U. S. 284; *Hopkins v. Noyes*, 4 Mont. 550; S. C. 2 PAC. REP. 280.

In the *Eureka Case*, 4 Sawy. 302, the court, FIELD, J., delivering the opinion, said:

"The provision of the statutes of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction."

The court was requested by plaintiffs to so instruct the jury, and refused to do so. We think the instruction should have been given. The other exceptions are overruled. Judgment and order reversed.

We concur: THORNTON, J.; MYRICK, J.

(67 Cal. 106)

STEPHENSON v. HAWKINS. (No. 9,720.)

Filed June 3, 1885.

1. MORTGAGE—RELEASE—CANCELLATION FOR FRAUD AND MISTAKE—EVIDENCE.
In a proceeding to cancel a release of mortgage, on the ground of fraudulent representation and mistake, in the absence of evidence of such fraud or mistake, the release cannot be avoided on the mere ground of want of consideration.
2. SAME—DECLARATIONS OF MORTGAGEE, ADMISSIBILITY OF.
In an action to cancel a release of mortgage, executed by plaintiff's intestate, on the ground of fraud and mistake, evidence of declarations made by such intestate after the execution of such release is inadmissible.

Department 2. Appeal from the superior court of the county of Los Angeles.

W. P. Gardener, W. D. Gould, and Blackstock & Sheppard, for appellant.

A. M. Stephens and Williams & Williams, for respondent.

SHARPSTEIN, J. The plaintiff, as administrator of the estate of Eli W. Hawkins, deceased, alleges that he in his life-time was induced to enter of record in due form the satisfaction of a mortgage executed by the defendants P. B. Hawkins and Arnold upon certain real estate, of which they were the owners, to secure the payment of their promissory note to said intestate, by the agreement of said mortgagors that defendant P. B. Hawkins should convey his interest in said promissory note to defendant Arnold, and he to defendant Adaline Hawkins, and she to the defendants Edward Hawkins, Effie Hawkins, and Eli Hawkins, minor children of said intestate, to be held by them in trust for him. The several conveyances were made, but that from defendant Adaline to said minor children conveyed the property to them absolutely, and not in trust for said intestate. And the conveyance from defendant Arnold to said defendant Adaline, who is, and at the time of the execution of said deed was, the wife of said defendant P. B. Hawkins, expresses on its face a consideration of one dollar.

It is alleged that the sole consideration for releasing the mortgage was the agreement of the defendants P. B. Hawkins and Arnold that the legal title to the property, by the circuitous method above stated, should be vested in intestate's said minor children, to be by them held in trust for him; and that said agreement was not carried out. Appellant's insistence is that the conveyance is in terms absolute, and does not convey any title whatever, because the conveyance from defendant Arnold to defendant Adaline, the grantor in said deed to said minors, expresses a valuable consideration, which, she being a

married woman at the time, vested the title in the community. And it is alleged in the complaint that said defendants P. B. Hawkins and Arnold falsely and fraudulently represented to said intestate that the deed of said defendant Adaline to said minors conveyed a perfect legal title to them in trust for him, and that on the faith of that representation he released said mortgage. Therefore, the plaintiff prays to have said release canceled, and for a judgment of foreclosure of the mortgage.

The infant defendants, by their guardian, deny in their answer all the allegations upon which the plaintiff bases his claim to have the release of the mortgage canceled; and, after the plaintiff had introduced his evidence upon the issues so raised, and rested, the court, on motion of defendants, granted a nonsuit. Plaintiff moved, on a statement, for a new trial, which was denied; and from that order this appeal is taken.

There is no evidence tending to prove that any misrepresentations were made to the intestate, or that he did not know the exact character and effect of the several deeds executed in consideration of his releasing his mortgage on the premises. One witness who was present at the negotiation testified that the only consideration for the release of the mortgage was "the deed of Adaline Hawkins, executed to the children."

Conceding that the evidence shows that no part of the sum claimed to be due on the mortgage was ever paid, we discover no evidence which would justify any court in finding that the release was obtained by misrepresentation, or executed by mistake. In the absence of any such evidence, the release cannot be avoided on the simple ground of want of consideration. It does not appear that the consideration was not just what all the parties contemplated, and the evidence introduced by plaintiff tends to prove that it was.

Evidence of declarations made by intestate after he had executed the release was clearly inadmissible, and it was not error to strike it out after it had been erroneously admitted. The objection to the introduction in evidence of the letter of defendant P. B. Hawkins, written long after the execution of the deeds, was properly sustained.

Order affirmed.

We concur: THORNTON, J.; MYRICK, J.

(87 Cal. 115)

WOOD v. SUPERIOR COURT. (No. 11,031.)

Filed June 4, 1885.

APPEAL FROM JUSTICE'S COURT—JUSTIFICATION OF SURETIES.

Where, on an appeal from the justice's to the superior court, appellant gives an undertaking, and the sufficiency of the sureties thereon is excepted to by the adverse party, and neither the sureties in the undertaking nor other sureties justify; but, instead thereof, appellant files a new undertaking with other sureties, and, in so doing, gives no notice as required by the statute, (Code Civil Proc. § 978,)—such appeal must be regarded as if no undertaking had been given.

Department 2. Appeal from the superior court of the county of Monterey.

Geil & Morehouse, for petitioner.

Mr. Webb, for respondent.

By THE COURT. *Certiorari*. In perfecting his appeal from the justice's court to the superior court, the appellant gave an undertaking. The adverse party excepted to the sufficiency of the sureties. Neither the sureties in the undertaking nor other sureties justified; but, instead thereof, the appellant filed a new undertaking with other sureties. In so doing he gave no notice, as required by the last clause of section 978, Code Civil Proc. Such being the case, "the appeal must be regarded as if no such undertaking had been given." The statute is peremptory. Without the justification of the sureties named in the undertaking, or other sureties in their stead, *upon notice to the adverse party*, the appeal was not perfected, and the superior court has no jurisdiction of the case. The motion to dismiss the appeal should have been granted.

The proceedings in the superior court are annulled.

SUPREME COURT OF KANSAS.

(33 Kan. 654)

MITCHELL and others v. INSLEY and another.

Filed June 4, 1885.

1. JUDGMENT—WHEN RENDERED—JOURNAL OF COURT.

Where the district court has jurisdiction of the parties and subject-matter of the action, and the journal of the court recites a trial and judgment in term time, the record imports absolute verity, and cannot, in a collateral proceeding, be overthrown by parol testimony tending to show that the trial was had and the judgment rendered in vacation.

2. RES ADJUDICATA—EFFECT OF FINDING OF FACT.

A finding of fact of the trial court cannot be considered an adjudication, or used as evidence, unless some other ground can be found for its use than merely that it is a finding of the court. *Auld v. Smith*, 23 Kan. 65.

3. MORTGAGE—ABSOLUTE DEED—FINDING IN FORMER ACTION OF EJECTMENT.

In an action of ejectment, the plaintiff, to sustain his paramount title, relied upon what purported upon its face to be a warranty deed. To defeat said paramount title, the defendant showed the deed was executed as a mortgage only. The court trying the case found, among other things, that said deed was in effect a mortgage, and that no part of the said mortgage had been paid, but rendered judgment for the defendant. In a subsequent action to foreclose said deed as a mortgage, the finding that no part of the mortgage had been paid, cannot be regarded as conclusive; therefore, the defendant in the ejectment action is not estopped from contesting the amount due on the mortgage by the findings and judgment of the former action.

Error from Jefferson county.

Geo. J. Baker and Harris & Harris, for plaintiffs in error.

Keeler & Gephart and Lucien Baker, for defendants in error.

HORTON, C. J. The facts in this case are substantially as follows:

On October 4, 1878, David H. Mitchell and his then wife, Martha B. Mitchell, executed and delivered to M. H. Insley their warranty deed, conveying over 500 acres of land in Jefferson county, in this state. On October 8, 1880, Insley filed his petition in the district court of Jefferson county against Sarah A. Mitchell and her tenant, James M. Kerr, for the recovery of 200 acres of the land embraced in said warranty deed. This petition followed the usual statutory form. Section 595, Code. To this petition Sarah A. Mitchell and her tenant, James M. Kerr, filed separate answers. Each answer contained only a general denial of the allegations in the petition. The issues thus formed were submitted to the court without a jury, with a request that the court find the facts specifically and state its conclusions of law thereon. This was done. Among other findings of fact were the following: "That on October 4, 1878, Sarah A. Mitchell borrowed of M. H. Insley the sum of \$2,000, payable within one year from date, with interest at 12 per cent. per annum; that on the same day David H. Mitchell and his then wife, Martha B. Mitchell, executed and delivered to M. H. Insley their warranty deed of the lands described in the petition, together with other lands, all situate in Jefferson county; that this deed was recorded in the office of the register of deeds of Jefferson county on October 5, 1878; that David H. Mitchell, at the execution of said deed, was the owner in fee-simple of the land described therein; that M. H. Insley executed and delivered to David H. Mitchell a memorandum in writing, at or about the same time of the receipt of said deed, agreeing, at any time within one year from date thereof, to reconvey said land to David H. Mitchell upon the payment of said sum of \$2,000, with in-

terest at 12 per cent. per annum; that the conveyance of said land was intended as security; that neither said sum of money, nor interest, nor any part thereof, had been paid to M. H. Insley; that M. H. Insley, in making said loan, and in obtaining said deed, acted in good faith." The court, upon the facts, concluded that the deed and memorandum of October 4, 1878, constituted a mortgage to secure the payment of \$2,000, and that M. H. Insley had a lien upon the land described therein for the amount due upon the loan, and that his remedy, if any, was not by ejectment. Judgment was rendered in that action for the costs in favor of defendants Sarah A. Mitchell and James M. Kerr.

Subsequently, and on February 8, 1883, Insley commenced his action in the district court of Jefferson county against David H. Mitchell, Martha B. Mitchell, Sarah A. Mitchell, V. H. Harris, W. A. H. Harris, and others, to foreclose, as a mortgage, said deed of October 4, 1878, and attached to his petition the findings of fact and conclusions of law found and stated in the former action of *M. H. Insley v. Sarah A. Mitchell and James M. Kerr*. David H. Mitchell and his wife, Martha B. Mitchell, admitted the correctness of Insley's petition and the allegations therein by making default. Sarah A. Mitchell filed a separate answer and cross-petition, wherein she denied, generally, all the allegations of the petition. She also alleged that the findings of law and fact set forth in the petition were entirely foreign to the issues in the ejectment action between Insley and herself, and that the court rendering judgment in that case had no power, authority, or jurisdiction to make or render any general or special judgment therein; and that the findings of law and of fact, and judgment, were null and void. She further alleged that the title to the premises was in her under and by virtue of a sheriff's deed, and that the mortgage deed of October 4, 1878, was executed with the intent to cheat and defraud her, and was void. The defendants V. H. and W. A. H. Harris filed separate answers, which contained the same defenses as that of Sarah A. Mitchell, and further alleged that they were the owners in fee-simple and in the peaceable possession of the premises described in their answers. They also alleged that the title and interest of the other defendants were wholly inferior to and void as against their title. Insley filed his replies to the various answers and cross-petitions. Trial had to the court without a jury.

It is claimed that the district court erred and abused its discretion in refusing the motion of Sarah A. Mitchell, one of the defendants, for a change of venue. Her motion alleged that the district judge, Hon. ROBERT CROZIER, was a material witness on the trial of the action, and disqualified to sit in the case. Upon the hearing of the motion, the attorneys of Sarah A. Mitchell stated she expected to prove by the district judge that the ejectment action of Insley against herself and Kerr was tried in Leavenworth city, Leavenworth county, in vacation, and not in Jefferson county; that the alleged judgment was pronounced in Leavenworth city and transmitted to the clerk of the district court of Jefferson county, to be entered as of the last day of the October term of court for 1882. The record controverts the assertions of the attorneys of Sarah A. Mitchell, and shows the case was tried in Jefferson county at the October term thereof for 1882. The record imports absolute verity, and cannot in a collateral proceeding be overthrown by parol testimony; hence there was no error in refusing the change of venue, because the evidence sought to be introduced was wholly immaterial, and also for other reasons.

In re Watson, 30 Kan. 753; S. C. 1 PAC. REP. 775. The objection to the admission of the record in the ejectment action, on the ground that the case was tried in vacation, for a like reason is equally untenable. *Earls v. Earls*, 27 Kan. 538, is not in conflict with this conclusion. In that case the fact that the judgment was rendered and entered in vacation appeared upon the face of the record, and this point was raised directly in the petition in error.

The important question for our consideration in this case is whether all the findings of fact in the ejectment action are conclusive upon Sarah A. Mitchell in the foreclosure suit. It is the general duty of the court trying a case to find upon all the issuable facts; yet findings which are not necessarily included in and become a part of the judgment, are not conclusive in other actions. Even where such findings are confirmed by final judgment, they are adjudications only, so far as they are necessarily included in and become a part of the judgment. *Auld v. Smith*, 23 Kan. 65. "A thing contained in the finding or verdict, but not included in or confirmed by the judgment, cannot be considered as an adjudication, or used as evidence, unless some other ground can be found for its use than merely that it is contained in such finding or verdict." *Auld v. Smith*, *supra*; *McCundliss v. Kelsey*, 16 Kan. 557; *Brenner v. Bigelow*, 8 Kan. 496.

In the ejectment action Insley claimed title paramount to that of the defendants. The defendants had the right to show anything that would tend to prove or disprove the plaintiffs' cause of action. *Clayton v. School-district*, 20 Kan. 256. As all the parties in that case claimed title from David H. Mitchell, the sheriff's deed to Sarah A. Mitchell, and the deed of October 4, 1878, to M. H. Insley, were directly in issue. Both of these alleged titles had to bear judicial investigation. The findings of fact were made at the request of the parties, and it is apparent from such findings that the court found that the deed of October 4, 1878, was not only executed, but further found it was not fraudulent, and that it was paramount to the sheriff's deed to Sarah A. Mitchell. In this condition of the case, to defeat Insley's title, Sarah A. Mitchell undoubtedly offered her evidence showing that such deed was, in effect, a mortgage only. All the findings, except the one that no part of the mortgage or interest had been paid, were adjudications binding until reversed, and we do not think they can be attacked collaterally. We do think, however, the finding that "said sum of money, or interest, or any part thereof, has not been paid," was not necessarily embraced in the issues or included in the judgment in ejectment. The defendants in the ejectment action defeated the paramount title of Insley when they established that his deed upon which he relied was a mortgage only. The makers of that mortgage were not parties in the ejectment action, and it was not only unnecessary, but out of place, to have an account taken in that action as to the actual amount of money due upon the mortgage. The amount due on the mortgage in the ejectment action was wholly immaterial. The adjudication is

conclusive upon the parties that the deed was a mortgage, and, perhaps, that something was due, but not the amount; therefore Sarah A. Mitchell is not estopped by the findings and judgment in the ejectment action from contesting the amount due on the mortgage. The trial court committed error in ruling that the finding of the amount due upon the mortgage in the ejectment action was conclusive in the foreclosure suit, and in refusing to receive evidence tending to contradict said finding.

We have not thought it necessary to refer to V. H. and W. A. H. Harris, the other defendants in the foreclosure suit, in connection with the findings in the ejectment action, because upon the trial V. H. and W. A. H. Harris claimed to own the lands described in their answers in fee-simple by tax deeds, and adversely to their co-defendants. Their alleged title, if they possess any title, is superior to that of either M. H. Insley or Sarah A. Mitchell, and therefore, notwithstanding the allegations in their answer, they are not interested in the findings or proceedings in the ejectment action. They are not called upon to dispute such findings or judgment. Even if their tax deeds are defective, their claims thereunder are not interfered with in any way by the priorities of the inferior liens of the other parties.

It is not necessary to dispose of the other questions submitted, as a new trial must be had; and it is more than probable that V. H. and W. A. H. Harris will, with the consent of the court, amend their answers, and thus the issues may be somewhat changed at another trial. The judgment of the district court will be reversed, and cause remanded for further proceedings in accordance with the views herein expressed. (All the justices concurring.)

(33 Kan. 660)

ATCHISON, T. & S. F. R. Co. v. WAGNER.

Filed June 4, 1885.

1. RAILROAD COMPANY—RISKS ASSUMED BY EMPLOYEE.

An employe of a railroad company, by virtue of his employment, assumes all the ordinary and usual risks and hazards incident to his employment.

2. SAME—COMPANY NOT AN INSURER—MACHINERY.

As between a railroad company and its employes, the railroad company is not an insurer of the perfection of any of its machinery, appliances, or instrumentalities for the operation of its railroad.

3. SAME—DUTY OF COMPANY.

As between a railroad company and its employes, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employes reasonably safe machinery and instrumentalities for the operation of its railroad.

4. SAME—NEGLIGENCE—BURDEN OF PROOF.

It will be presumed, in the absence of anything to the contrary, that the railroad company performs its duty in such cases; and the burden of proving otherwise will rest upon the party asserting that the railroad company has not performed its duty.

5. SAME—EVIDENCE.

And where an employe seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the

railroad company, it will not only devolve upon such employe to prove such insufficiency, but it will also devolve upon him to show, either that the railroad company had notice of the defects, imperfections, or insufficiencies complained of, or that, by the exercise of reasonable and ordinary care and diligence, it might have obtained such notice.

6. SAME—SINGLE DEFECT.

And proof of a single defective or imperfect operation of any of such machinery or instrumentalities, resulting in injury, will not of itself be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection, or insufficiency in such machinery or instrumentalities.

7. SAME—NOTICE OF DEFECTS.

As between a railroad company and its employes, the railroad company is not necessarily negligent in the use of defective machinery not obviously defective, but it is negligent in such cases only where it has notice of the defects, or where it has failed to exercise reasonable and ordinary diligence in discovering them and in remedying them.

8. SAME—VERDICT SET ASIDE, WHEN.

Whenever the verdict of a jury, or any necessary and material fact involved in the verdict, is not sustained by the evidence, or by any sufficient evidence, the supreme court will set it aside and grant a new trial, although the verdict may have been approved by the trial court.

Error from Reno county.

A. A. Hurd, John Reid, W. C. Campbell, and Robert Dunlap, for plaintiff in error.

Whiteside & Hutchinson, for defendant in error.

VALENTINE, J. This was an action brought by Robert Wagner against the Atchison, Topeka & Santa Fe Railroad Company for damages for personal injuries alleged to have resulted from the negligence of the defendant. The case was tried before the court and a jury, and judgment was rendered in favor of the plaintiff and against the defendant for \$2,000 and costs of suit, and from this judgment the defendant, by petition in error, appeals to this court. It appears from the record brought to this court that on December 23, 1881, and prior thereto, Wagner was in the employment of the railroad company as a yard switchman at Nickerson, Kansas. His duties as switchman required him to couple and uncouple cars, make up trains, etc. Nickerson being the end of a division of the defendant's railroad, it was customary at that place to take off a car or coach from the western-bound passenger train, which arrived at that place each evening, and to put it on the eastern-bound passenger train the next morning. A switch-engine was used for this purpose, and among the duties performed by Wagner were to couple and uncouple the passenger coach to and from this engine. The passenger coaches were equipped with a kind of draw-bars usually known as "the Miller coupling,"—an invention by which coaches are coupled to each other automatically, without the use of links or pins. Links or pins, however, may be used in coupling rolling stock equipped with this kind of coupling, and are so used whenever a coach equipped with this kind of coupling is coupled to another coach or car or engine not so equipped. The switch-engine was equipped with an oval-faced draw-head, with two or three slots or shelves, into which a link might be

placed for coupling. One witness testified that this contrivance for coupling was called a "Hinckley switch-engine draw-head." In coupling or uncoupling coaches equipped with the Miller coupling to an engine, equipped as this engine was, it was necessary to use a link and pins.

On the morning of December 23, 1881, Wagner was ordered by J. W. Reed, the yard-master, to get on the switch-engine, which had already been coupled to the passenger coach and was standing on the side track, and to place the passenger coach in the eastern-bound passenger train. Wagner got on the step or platform of the engine, and between the engine and the coach, for the purpose of obeying this order. The engine and coach were then moved by the engineer in obedience to a signal from Wagner, and when they arrived at the proper place Wagner endeavored to uncouple the engine from the passenger coach, and in doing so he attempted first to pull the pin from the draw-head of the engine, but finding that the head of the pin was broken and the pin difficult of removal, he then reached over to the draw-bar of the passenger coach and pulled that pin. The engine at the time was pushing against the coach, and the draw-bar of the coach slipped by the draw-head of the engine, and, catching the plaintiff's leg, broke it about two or three inches above the knee. This incapacitated him for work for a long time, and he endured pain and incurred expense, but his leg finally got to be nearly as well and sound as before the accident.

No negligence is imputed to the yard-master or to the engineer, and it is not claimed that the engine or the passenger coach was in any manner defective, or out of order, except the defects in the coupling-pins, of which the plaintiff had full and complete knowledge, and the spring or appurtenances connected with the draw-bar of the passenger coach, of which the plaintiff did not have any notice or knowledge. Indeed, no person is shown to have had any notice or knowledge of any defect in such draw-bar, or in anything connected therewith; and it is certainly, at least, very doubtful whether there was in fact any such defect. The jury, however, upon very weak evidence, found that there was such a defect; and for the purposes of this case we shall assume that there was.

The question then arises, is the defendant liable because of such defect, and upon the other facts of this case? We think not. It must be remembered that the question in this case does not arise between the railroad company and a passenger, or between the railroad company and some third person having no connection or contract relation with the railroad company; but it arises between the railroad company and one of its employees, who by reason of his employment has assumed all the ordinary risks and hazards incident to his employment. A passenger pays to be protected from all the risks and hazards incident to the operation of a railroad, from which the railroad company can, by the highest degree of skill and care, protect

him; while an employe of the railroad company is paid to assume all the risks and hazards incident to his employment; and a third person having no connection or contract relation with the railroad company stands upon his original legal rights, being neither protected by the railroad company nor assuming any of the dangers, risks, or hazards incident to the operation of the railroad; and while such third person may not be placed in the same highly-favorable situation with regard to dangers, risks, and hazards as a passenger is, yet he is placed in a much more favorable situation than a mere employe of the railroad company who is paid to take the risks and hazards of his employment. Hence differences in the rules governing these various relations must be expected.

Mr. Thompson, in his work on Negligence, uses the following language:

"In an action by an employe against his employer, for injuries sustained by the former in the course of his employment, from defective appliances, the presumption is that the appliances were not defective; and when it is shown that they were, then there is a further presumption that the employer had no notice or knowledge of this fact, and was not negligently ignorant of it." Page 1053, § 48.

Mr. Wood, in his work on Master and Servant, uses the following language:

"The servant seeking to recover for an injury takes the burden upon himself of establishing *negligence on the part of the master*, and due care on his own part. And he is met by *two* presumptions, *both* of which he must overcome in order to entitle him to a recovery: *First*, that the master has discharged his duty to him by providing suitable instrumentalities for the business, and in keeping them in condition; and this involves proof of something more than the mere fact that the injury resulted from a defect in the machinery: it imposes upon him the burden of showing that the *master had notice of the defect*, or that, in the exercise of that ordinary care which he is bound to observe, he would have known it. When this is established, he is met by another presumption, the force of which must be overcome by him, and that is *that he assumed all the usual and ordinary hazards of the business*," etc. Section 382.

Shearman & Redfield, in their work on Negligence, use the following language:

"In actions brought by servants against their masters, the burden of proof as to the master's knowledge or culpability in lacking knowledge of the defect which led to the injury, whether in the character of a fellow-servant or in the quality of materials used, rests upon the plaintiff." Section 99.

Mr. Pierce, in his work on Railroads, uses the following language:

"The company's knowledge of a defect must be proved in order to make it liable for the consequences; but such knowledge may be shown by circumstances; as the length of time it existed before the injury, or by a notice given to an employe who had an express or implied authority to receive it. The fact that the servant complained of a defect in the road or its appointment, is admissible in proof of the company's knowledge." Page 373. "The burden of proof is on the servant to show that the company was negligent, and that his own negligence did not contribute to the injury; and, where the injury was caused by defects in the road or its appointments, that the company knew

or ought to have known them, or negligently employed incompetent persons to construct or repair them; and where it is alleged to have been caused by the incompetency of fellow-servants, that the servant was incompetent, and the company knew or ought to have known of such incompetency; and he must show that he did not himself, before the injury, know of such defects or incompetency. The company's negligence is not to be inferred from the fact of injury by a collision of trains, or by an explosion of engines, even in jurisdictions where negligence is implied from the collision or explosion in case of injuries to passengers or third persons." Page 382.

The supreme court of Iowa, in a recent decision, uses the following language:

"As to driving in the draw-bar, there is no evidence whatever that any of the officers of the defendant had any knowledge that the draw-bar was in any way defective, or that it was defective in its original construction. Without some evidence on this question there could be no recovery for that defect, if there was any defect." *Skellenger v. Chicago & N. W. Ry. Co.* 61 Iowa, 714, 715; S. C. 17 N. W. Rep. 151; S. C. 12 Amer. & Eng. R. Cas. 206, 207.

There are a vast number of other cases announcing the same principles and sustaining the elementary works above cited, so far as we wish to apply them to this case, among which are the following: *De Graff v. New York Cent. & H. R. R. Co.* 76 N. Y. 125; *Warner v. Erie Ry. Co.* 39 N. Y. 468; *Elliott v. St. Louis & I. M. R. Co.* 67 Mo. 272; *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672; *Columbus, C. & I. C. Ry. Co. v. Troesch*, 68 Ill. 545; *Chicago & A. R. Co. v. Platt*, 89 Ill. 141; *Indianapolis, B. & W. Ry. Co. v. Toy*, 91 Ill. 474; *East St. Louis, P. & P. Co. v. Hightower*, 92 Ill. 139; *Wonder v. Burlington & O. R. Co.* 32 Md. 411; *Ballou v. Chicago, M. & St. P. Ry. Co.* 54 Wis. 257; S. C. 11 N. W. Rep. 559; S. C. 5 Amer. & Eng. R. Cas. 480, and note, 504; *Smith v. Chicago, M. & St. P. Ry. Co.* 42 Wis. 520; *Flannagan v. Chicago & N. W. Ry. Co.* 50 Wis. 462; S. C. 7 N. W. Rep. 337; *Ladd v. New Bedford Ry. Co.* 119 Mass. 412; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; S. C. 3 N. W. Rep. 240; *Columbus & I. C. Ry. Co. v. Arnold*, 31 Ind. 174; *Missouri Pac. R. Co. v. Lyde*, 57 Tex. 505; S. C. 11 Amer. & Eng. R. Cas. 188.

We think the following principles are deducible from the foregoing authorities, and are sound law: (1) An employe of a railroad company, by virtue of his employment, assumes all the ordinary and usual risks and hazards incident to his employment. (2) As between a railroad company and its employes, the railroad company is not an insurer of the perfection of any of its machinery, appliances, or instrumentalities for the operation of its railroad. (3) As between a railroad company and its employes, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employes reasonably safe machinery and instrumentalities for the operation of its railroad. (4) It will be presumed, in the absence of anything to the contrary, that the railroad company performs its duty in such cases, and the burden of proving otherwise will rest upon the party asserting that the railroad company

has not performed its duty. (5) And where an employe seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the railroad company, it will not devolve upon such employe to prove such insufficiency; but it will also devolve upon him to show either that the railroad company had notice of the defects, imperfections, or insufficiencies complained of, or that, by the exercise of reasonable and ordinary care and diligence, it might have obtained such notice. (6) And proof of a single defective or imperfect operation of any of such machinery or instrumentalities, resulting in injury, will not of itself be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection, or insufficiency in such machinery or instrumentalities. (7) As between a railroad company and its employes, the railroad company is not necessarily negligent in the use of defective machinery, not obviously defective, but it is negligent in such cases only where it has notice of the defects, or where it has failed to exercise reasonable and ordinary diligence in discovering them and in remedying them.

The decisions in this state are, so far as they go, in consonance with the decisions elsewhere. *Kelly v. Detroit Bridge Works*, 17 Kan. 558, 562; *Missouri Pac. Ry. Co. v. Haley*, 25 Kan. 35, 56, 62, 63; *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 149; *Jackson v. Kansas City, L. & S. K. R. Co.* 31 Kan. 761; S. C. 3 PAC. REP. 501.

In the present case, as no negligence is imputed to the railroad company except in using a passenger coach with a draw-bar connected with a defective spring, or with some other defective appliance, and as it is not shown that the railroad company, or any of its employes, or, indeed, any other person, had any knowledge or notice of such defect prior to the occurrence of the accident upon which the plaintiff's action is founded, it cannot be said that any negligence whatever upon the part of the railroad company has been shown, and the verdict and judgment in the court below should have been rendered in favor of the railroad company; but they were not, but, on the contrary, both were rendered against the railroad company. After the verdict was rendered the defendant moved the court to set it aside and for a new trial, upon various grounds, among which were the grounds that the verdict was not sustained by sufficient evidence, and was contrary to law; but the court overruled the motion, and rendered the judgment aforesaid. Of course, by this ruling the court approved the verdict of the jury; but as the verdict and judgment are not sustained by sufficient evidence, although approved by the trial court, it becomes the duty of this court to set them aside and grant a new trial. It has frequently been held in this court that whenever the verdict of a jury, or any necessary and material fact involved in the verdict, is not sustained by the evidence, or by any sufficient evidence, the supreme court will set it aside and grant a new trial, although the verdict may have been approved by the trial court. *Backus v.*

Clark, 1 Kan. 304; *Ermul v. Kuliok*, 3 Kan. 499; *Howe v. Lincoln*, 23 Kan. 468; *Irwin v. Thompson*, 27 Kan. 643; *Union Pac. Ry. Co. v. Dyche*, 28 Kan. 200, 206; *Johnson v. Burns*, 29 Kan. 81, 86; *Reynolds v. Fleming*, 30 Kan. 106; S. C. 1 PAC. REP. 61; *Babcock v. Dieter*, 30 Kan. 172; S. C. 2 PAC. REP. 504.

The judgment of the court below will be reversed, and cause remanded for a new trial.

(All the justices concurring.)

(33 Kan. 670)

RULLMAN v. HULSE

Filed June 5, 1885.

PRACTICE—VENUE—SUMMONS—REHEARING.

Error from Doniphan county. Motion for rehearing overruled.

B. A. Seaver, F. Babcock, and C. W. Johnson, for plaintiff in error.
James Falloon, for defendant in error.

PER CURIAM. This case was heard and decided by the supreme court at its January term, 1884, and the judgment of the court below was affirmed, (*Rullman v. Hulse*, 32 Kan. 598; S. C. 5 PAC. REP. 176;) and the plaintiff in error now moves for a rehearing.

Under the statutes of Kansas an ordinary civil action for the recovery of money can be brought only in the county in which the defendant, or some one of the defendants, reside or may be summoned. Civil Code, § 55. And before a summons can be rightfully issued from one county to another, the person served with the summons in the county in which the action is brought, must have some real and substantial interest in the subject of the action, adverse to the plaintiff, and against whom some substantial relief may be obtained; and the action must be rightfully brought in the county in which it is brought, and as against the person served with summons in such county. *Brenner v. Egly*, 23 Kan. 123; *Dunn v. Hazlett*, 4 Ohio St. 435; *Allen v. Miller*, 11 Ohio St. 374. And an attachment against property can be had only in a civil action for the recovery of money at or after the commencement of the action, and by making and filing a proper affidavit of the plaintiff, his agent or attorney, showing the nature of the plaintiff's claim; that it is just; the amount which the affiant believes the plaintiff ought to recover; and the existence of one or more of the grounds for attachment mentioned in section 190 or section 230 of the Civil Code; and the attachment provided for by section 230 of the Civil Code can be had only after it has been granted by the court or a judge; and, except in case of non-residence, the order of attachment cannot be issued until after a proper undertaking has been given; and when the order of attachment has been issued, it can then be levied only upon the property of the defendant against whom the attachment was issued, and only upon such property of his as is not exempt from judicial process; and when the or-

der of attachment has been issued and levied upon the property, the attachment may, in any proper case, and for any good and sufficient reason, be vacated or discharged upon motion by any person interested in its discharge. *Watson v. Jackson*, 24 Kan. 443; *Green v. McMurtry*, 20 Kan. 189, 193.

The statute authorizing the discharge of attachment does not create any limitations upon the reasons or grounds for the discharge of attachments, or intimate that there is any such limitation. Civil Code, §§ 228, 229. It would therefore seem to follow that if no action is really commenced, or is commenced in the wrong county; or if the action is not a civil action or not for money, or not commenced at or before the time when the attachment is issued; or if no affidavit for the attachment is filed, or the affidavit is not sufficient, or does not show the nature of the plaintiff's claim, or that it is just, or the amount which the affiant believes the plaintiff ought to recover; or if the attachment is under section 230 of the Civil Code and has been granted by the court or a judge; or if it appear that the grounds for the attachment are not true; or if an undertaking is necessary and no proper undertaking has been given; or if the property attached does not belong to the defendant or is exempt from judicial process,—the plaintiff could not maintain his attachment as against any person interested in having it discharged, and who has made the proper motion for its discharge. This would certainly be the case if the defects or irregularities appeared on the face of the proceedings, as in the present case; but, of course, it would not be so certain in some of the above cases, if it had to be shown by evidence *dehors* the record. It has already been held by the supreme court of Kansas that where an action has been brought against a non-resident who was not in the county, and had no property or debts owing to him therein, and where an attachment was issued in such action to another county, and there levied upon the defendant's property, which could have been allowable if the action had been rightfully brought in the county in which it was brought, the attachment was void as against a subsequently attaching creditor. *Carney v. Taylor*, 4 Kan. 178. The statute provides that an action against a non-resident may be brought in any county in which the defendant or his property may be found, or in which debts are owing to him. It has also been held that on a motion to discharge an attachment against a non-resident, the defendant may, for the purpose of discharging the attachment, show that the action did not arise wholly within the limits of Kansas, as is required in such cases by the statute. *Stone v. Boone*, 24 Kan. 337. It has also been held, on a motion to discharge an attachment, that the defendant may controvert the grounds for the attachment, although in so doing he may controvert some of the allegations of the petition. *Bundrem v. Denn*, 25 Kan. 430, 435.

The only express mode of dissolving an attachment in Kansas is by motion, (Civil Code, § 228,) and the motion may be made before

or after appearance by the defendant, or before or after pleading by him. Of course, if the plaintiff should fail in his action, the attachment, which is only an incident thereto, would go with the action. But this failure is never considered as one of the distinctive modes, and is not an express mode, of dissolving an attachment. The attachment may be dissolved upon motion and for proper reasons before such failure, and without reference thereto. In some of the states the mode of dissolving an attachment is by plea in abatement, and in some of the states the defendant is required to appear and plead before he can ask to have the attachment dissolved; but this is not the case in Kansas. In a state where it is required that a defendant should plead before asking to have the attachment dissolved, there would be great reason for holding that nothing could be considered on the hearing of the application for the dissolution of the attachment, which might be put in issue by the pleadings, and might be involved by the merits of the action, or which might be heard and decided on the final trial of the case; and, indeed, there would be some reason for such a holding in any state, even where the defendant is not required to plead before moving to dissolve the attachment, and whether he has so pleaded or not; but in Kansas it is not strictly true that nothing can be considered on a motion to dissolve an attachment which is involved in the merits of the action. *Bundrem v. Denn*, 25 Kan. 430, 435. But even if such a thing were strictly true in Kansas, still it would not affect the decision in this case; for nothing was heard or decided, or could be heard or decided, in this case, which could be heard or decided on the final trial, upon the merits of the action. Whether the defendant in this case was rightfully sued in Doniphan county or not, is not one of the issues presented by any of the pleadings in this case; and such a question could not be heard or tried upon the final trial upon the merits of the case. The only manner in which such a question could be heard or tried would be upon a motion to dissolve the attachment, or a motion to quash or set aside the summons or the service thereof, or a plea in the nature of a plea in abatement, filed and presented for hearing before answer to the merits, and before any general appearance in the case; and therefore, as the question must be heard, if heard at all, upon a motion of some kind, or a plea in abatement, and not upon the final trial upon the merits, is it not better that it should be heard and decided at the earliest possible moment? It might be heard upon a motion to discharge the attachment at a very early day, while there might not be any possibility of its being heard upon a motion to quash or set aside the summons, or the service thereof, or on a plea in abatement, for several months. The defendant might be in great need of the property, or it might be of such a perishable nature that it could not be kept for any considerable length of time.

For further argument upon all the questions involved in this case, see the original opinion in this case,—*Rullman v. Hulse*, 32 Kan. 599;

S. C. 5 PAC. REP. 176. We think the decision of the court below in this case is correct. It seems to be sustained by good reason and the statutes of Kansas, and we know of no decision under similar statutes against it. See *Waples, Attachm. & Garn.* 526 *et seq.*

We have examined all the cases cited by counsel, and we do not think that any of them conflicts with our decision in the present case. The case of *Drea v. Carrington*, 32 Ohio St. 595, upon which the plaintiff in error seems so confidently to rely, is not applicable to the present case. In that case no attachment was asked for or issued, and no motion was made to dissolve an attachment; indeed, there was nothing relating to an attachment in the case. The petition stated a cause of action against all the defendants, and some of them filed a motion to dismiss and also an answer, both controverting the allegations of the petition; and the court held that the case could not be tried upon the motion, but must be tried upon the answer, and that the case was such that either party had a right to a trial by jury. No such questions are raised in the present case. The question in the present case is whether an attachment shall be discharged or not, and not whether any of the allegations of the petition are true or not. The motion to discharge the attachment in the present case does not controvert any of the allegations of the petition, nor even any of the allegations of the plaintiff's affidavit for the attachment. For the purposes of this case it may be admitted that every allegation of the petition is true, and that every statement made in the plaintiff's affidavit for the attachment is true. But the other portions of the record, with some corroborating evidence, show that the defendant in the attachment was not rightfully sued in Doniphan county, and that no order of attachment should have been issued against him in that county; and therefore the record, with such evidence, shows that the attachment was wrongfully issued against the defendant in the present case.

The motion for a rehearing will be overruled.

(33 Kan. 640)

MISSOURI PAC. RY. CO. v. ROADS.

Filed June 4, 1885.

1. RAILROAD COMPANY—FENCING AGAINST HOGS—KANSAS STATUTE.

The railroad stock law of 1874 imposes an obligation upon railroad companies to fence their tracks against all animals, including hogs, against which a good and lawful fence would be a protection. *Missouri Pac. Ry. Co. v. Bradshaw*, 33 Kan. —; S. C. 6 PAC. REP. 917.

2. SAME—HOGS TRESPASSING ON ADJOINING LAND.

The statute is in the nature of a police regulation, intended to protect domestic animals generally, and to promote the security of persons and property passing over the road, and is not designed merely for the benefit of the adjoining land-owner. The railroad company is therefore under a general obligation to the public; and, in an action under the statute, the mere fact that the animals were trespassers upon the adjoining land, from which they went onto the unfenced railroad track and were killed, will not, where they escaped from the plaintiff's inclosure without his fault, defeat a recovery.

3. SAME—CONDUCT OF OWNER.

But where the owner of animals voluntarily places them on the track, or purposely exposes them to danger, no recovery for their injury can be had.

Error from Neosho county.

David Kelso, for plaintiff in error.

John Hall, for defendant in error.

JOHNSTON, J. J. N. Roads brought suit before a justice of the peace of Neosho county to recover the value of eight hogs belonging to him, which were run against and killed by the engine and cars of the Missouri Pacific Railway Company. The action was brought under the railroad stock law of 1874, and the plaintiff alleged in his bill of particulars that the hogs were not killed near any public road or crossing, but, without any fault on his part, they went upon the railroad track and were killed at a place where the railroad ought to have been but was not inclosed by any fence. It was also alleged that the hogs were killed by reason of the negligence of the railway company, its agents and servants. There was an averment that a demand was duly made by the plaintiff upon the railway company for the value of the hogs killed, but that payment was refused. In the justice's court judgment was given in favor of the plaintiff, and the defendant prosecuted an appeal to the district court, where the case was tried without a jury, and a general finding made that the allegations of the plaintiff in his bill of particulars were true; that he was entitled to recover the sum of \$75, the value of the hogs killed, and the further sum of \$35 attorney's fees; and judgment was rendered accordingly.

The railway company contends that this judgment is erroneous, and cannot stand, because it was obtained under the railroad stock law, which, it is claimed, has no application to hogs, and imposes no obligation upon railroad companies to fence against them. This question, as well as most of the points raised in the case, has been decided adversely to the contention of the railway company in the recent case of the *Missouri Pac. Ry. Co. v. Bradshaw*, 33 Kan. —; S. C. 6 Pac. Rep. 917. There it was ruled that "the railroad company is required to fence against all animals against which a good and lawful fence would be any protection," and that "where a good and lawful fence will protect a railroad track against any particular hogs, the railroad company is bound to fence as against such hogs, and if the defendant railroad company, in such a case, claims that it was not bound to fence its road, as against the particular animal in question, it devolves upon the railroad company to show it." In this case no testimony was offered by the defendant, and the plaintiff's testimony does not disclose how large the hogs were; but, presumptively, a lawful fence would have prevented them from going upon the railroad track. *Missouri Pac. Ry. Co. v. Bradshaw*, *supra*.

About the only distinction between the *Bradshaw Case* and the present one is that in the former case the railroad ran through the prem-

ises of Bradshaw, and the animals in that case passed directly from the land of the owner onto the railroad track, where they were killed. In this case it does not appear that plaintiff's land extended to the track, although the distance between the pen where the hogs were inclosed, and the point where they went upon the railroad track and were killed, was only from a quarter to a half mile. It is claimed that the plaintiff was negligent in that the hogs were trespassers upon the adjoining land, and that the company cannot be held liable under the statute for killing animals that were unlawfully upon the adjoining land, and came therefrom upon its unfenced track, unless after the animals were discovered upon the track the company and its employes failed to exercise ordinary care to prevent injuring them. Upon this question the general rule appears to be that where a statute requiring railroads to fence their tracks is a general police regulation, intended to protect domestic animals generally, and also for the safety of persons and property passing over the road, and is not designed merely for the benefit of the adjoining land-owner, that the railroad company is held to be under a general obligation to the public, and is liable for animals injured and killed on its unfenced track, even though they were unlawfully upon the land from which they passed onto the railroad track. *Indianapolis & C. R. Co. v. Townsend*, 10 Ind. 38; *Railroad Co. v. Maiden*, 12 Ind. 10; *Railroad Co. v. McKinney*, 24 Ind. 283; *Railroad Co. v. Guard*, 24 Ind. 222; *McCall v. Chamberlain*, 13 Wis. 637; *Curry v. Railroad Co.* 43 Wis. 665; *Fawcett v. Railway Co.* 16 Q. B. 610; *Pierce*, R. R. 414.

This is the character and purpose of our statute, and it has been so construed by this court. It was said that "the fencing of the railroad track is a duty not merely for the protection of cattle, but for the protection of the lives and safety of persons on railroad trains, whether employes or passengers. The enforcement of this duty is the exercise of the police power of the state." *Sherman v. Anderson*, 27 Kan. 335. Under this construction of the statute the mere fact that the animals were trespassing upon the land from which they went onto the unfenced railroad track, will not, where the plaintiff is without fault, defeat a recovery. Of course, no recovery could be had for an injury arising from the failure of the railroad company to fence its track, where the owner purposely placed his animals in a position of danger. But there is nothing in the record of this case that would justify such a charge against the plaintiff. Indeed, the escape of the hogs from the pen in which they were inclosed appears to have been a mere accident, and no negligence can be properly attributed to the plaintiff therefor. The testimony shows that the hogs had been carefully inclosed in a strong pen made of posts and boards of proper height, and that on the morning of the accident a neighbor's bull came along, and, in attempting to jump into the pen, broke it down in such a way that the hogs were allowed to pass out of it. They had never before escaped from this inclosure; and on this occa-

sion the plaintiff discovered that they had gone within a few minutes after their escape, and immediately sent parties in pursuit of them, but before overtaking them they went upon the unfenced railroad track and were killed. It was no fault of the plaintiff that the hogs escaped from the inclosure; neither did they stray upon the railroad track by reason of any negligence of the plaintiff; and we must therefore hold that he is entitled to indemnity for their loss. *Kansas City, F. S. & G. R. Co. v. McHenry*, 24 Kan. 503.

The judgment of the district court will be affirmed.
(All the justices concurring.)

(33 Kan. 644)

HOFFFIELD v. BOARD OF EDUCATION OF THE CITY OF NEWTON, STATE OF KANSAS.

Filed June 4, 1885.

1. SUMMONS—MISNOMER OF CORPORATION.

If a summons is served on a corporation intended to be sued by a wrong name, and the corporation fails to appear and plead the misnomer, and suffers judgment to be obtained, it is concluded, and in all future litigation may be connected with the action or judgment by proper averments; and when such averments are made and proved, the corporation intended to be named in the judgment is affected as though it were properly named therein.

2. SCHOOL-DISTRICT—SUIT IN WRONG NAME—JUDGMENT BY DEFAULT.

Prior to January 22, 1880, the association of inhabitants of the territorial school limits of the city of Newton, for public school purposes, was named and known as "School-district No. 1, Harvey County, Kansas." On said date the city of Newton was declared by the public proclamation of the governor to be a city of the second class. After that time the public schools of said city possessed the usual powers of a corporation for public purposes, under the name and style of the "Board of Education of the City of Newton, of the State of Kansas." *Held*, that the new corporation took all the property and rights of the school district, and is liable for all of its obligations. *Held, further*, that in an action brought upon written orders issued by the school-district prior to January 22, 1880, where the board of education was sued by the name of the school-district, and the summons was served upon the board by delivering a copy thereof to the president of the board intended to be sued, and the board failed to appear and plead the misnomer or mistake, and suffered judgment to be obtained by default against it in the erroneous name, it is concluded, and such judgment, under proper averments made and proved, is valid against the board intended to be named in the judgment as though it were properly named therein.

Original proceedings in *mandamus*.

The facts in this case are as follows:

For eight years prior to 1880 the city of Newton was a city of the third class. The territory within the city, together with 13½ sections of land adjacent, was duly organized as school district No. 1, Harvey county, state of Kansas. While said district was so organized, and on August 11, 1879, Thomas C. Cutler was the director, S. A. Newhall the clerk, and H. Miles the treasurer, of the district, and constituted the board thereof. On August 11, 1879, while said officers were assembled as a board, they contracted with the Buffalo Hardware Company for school furniture, and ordered the company to ship the furniture from Buffalo, New York, to them at Newton, Kansas. On the same day the clerk and director gave two orders in payment of the contract price, for \$423.50 each, payable, one January 1, 1881, and the other January 1, 1882.

each to bear interest at 10 per cent. per annum from the first day of September, 1879. Of these two orders, R. Hoffield, the plaintiff, became the owner by assignment. In pursuance of the contract and order for the furniture, and transaction aforesaid, the Buffalo Hardware Company shipped from Buffalo, New York, to said school board at Newton, Kansas, said school furniture, which arrived in Newton, Kansas, on or about February 9, 1880, when said school board paid the freight thereon, and received the same and placed it in the school-house of the district, and it has ever since been in use in said school-house for school purposes. This school furniture has never been paid for.

On January 22, 1880, the city of Newton became a city of the second class.

No action was ever taken, or proceedings ever had, to attach any adjacent territory to said city for school purposes; but, at the first election occurring after Newton became a city of the second class, to-wit, on April 2, 1880, the electors of the territory lying outside of the city limits, and which had been a part of school-district No. 1, Harvey county, elected two members of the board of education of the city of Newton, who qualified, acted, and served as members of said board of education. The board thus elected was the first body ever acting in the name of the board of education of the city of Newton. Their successors had been regularly elected, and said positions filled ever since. The president of said board of education is from said outside territory. Ever since the organization of the city of Newton as a city of the second class, the adjacent territory has been recognized as a part of said city for school purposes, by the assessment, levy, collection, and payment of taxes, the enumeration of school children, and their attendance at school. The board of education of the city of Newton is a body corporate and politic, and succeeded to all the property of school-district No. 1, Harvey county, Kansas. On August 16, 1882, the plaintiff brought suit in the district court of Harvey county, Kansas, upon the said two orders, against "school-district No. 1 of Harvey county, Kansas," and caused a summons to be issued. This summons the sheriff returned with the following statement thereon: "As commanded by this writ, I summoned the within named school-district No. 1, on the sixteenth day of August, 1882, by delivering to R. M. Spivey, president of the school board of school-district No. 1, defendant, a copy of the within summons, and of the indorsements thereon." No appearance was made by any one in defense of the action, and judgment was rendered in favor of the plaintiff, and against school-district No. 1, Harvey county, Kansas, by default, for \$1,129.34, and costs.

On December 30, 1883, the plaintiff filed a petition in the district court to have this judgment corrected, and the name of the board of education substituted for the school-district as the judgment debtor. To this petition the board of education filed a general demurrer. This was sustained by the district court, and judgment rendered against the plaintiff for costs. This judgment has not been appealed from, and remains unreversed and in full force. R. M. Spivey, mentioned in the sheriff's return on the summons in the case of the plaintiff against school-district No. 1 of Harvey county, Kansas, was at that time president of the board of education of the city of Newton, of the state of Kansas, the defendant herein. Said judgment of \$1,129.34 against school-district No. 1, Harvey county, Kansas, has never been paid; nor has any tax been levied to pay the judgment, and the defendant refuses to make any levy for that purpose. On August 2, 1884, upon the application of plaintiff, an alternative writ of *mandamus* was issued out of this court requiring the defendant to levy a tax to pay the judgment of plaintiff against school-district No. 1, or to show cause for not doing so. On September 1, 1884, the defendants filed their answer and return to the alternative writ of *mandamus*.

Bowman & Bucher, for plaintiff.

Ady & Henry, for defendant.

HORTON, C. J. On January 22, 1880, the city of Newton was declared by the public proclamation of the governor to be a city of the second class, and thereafter such city was subject to the provisions of article 11, c. 122, Laws 1876, relating to public schools. Comp. Laws 1879, pp. 846-850. Prior to that time, the association of the inhabitants of the territorial school limits of the city of Newton, for public school purposes, was named and known as "School-district No. 1, Harvey County, Kansas." After that time, the public schools of said city possessed the usual powers of a corporation for public purposes, under the name and style of "The Board of Education of the City of Newton, of the State of Kansas." Section 4, c. 122, Laws 1876. The board of education of the city of Newton was substantially a continuance of "School-district No. 1, Harvey County," under a new name. All the property of school-district No. 1 passed to the board of education of the city of Newton, and said board became subject to all the liabilities of the old corporation. In some respects, the board of education was vested with powers not conferred upon school-district No. 1; but the merger of school-district No. 1 into the board of education did not relieve the latter corporation from an obligation to pay the debts of the school-district.

Now, a man or corporation may change his or its name between the time the cause of action arose and the bringing of the suit, but a corporation certainly loses none of its franchises or rights by such a change, when authorized by law. A corporation can recover by its new name a debt due before, and a creditor of the old corporation can recover his debt against the new corporation, if the latter takes all the rights and is subject to all the liabilities of the old corporation which it supersedes or continues.

It is insisted, however, by the defendant that the action of plaintiff commenced on August 16, 1882, against school-district No. 1, and the judgment rendered therein against said school-district, are not valid against the board of education. We think otherwise. A mistake was made in the name of the defendant, but the summons was served upon its president, and, in legal contemplation, the office he held clothed him with power to receive notice for and on behalf of the corporation; therefore the process was actually served upon the defendant, and upon a person qualified to represent the defendant in respect to such service, and notice to him was notice to the corporation which he then represented. This, therefore, may be regarded as the case of a misnomer. The defendant failed to plead the mistake in abatement, or otherwise, and the judgment binds the corporation although sued by a wrong name. The rule seems to be well established that where a corporation has taken no advantage of a variance from its name, either by plea or at the trial, it cannot arrest the judgment or reverse it on that account. *Ang. & A. Corp.* (11th Ed.) 1882, §§ 650, 651; *Insurance Co. v. French*, 18 How. 404; *Bank v. Jaggars*, 31 Md. 38; *Bank v. Eyer*, 60 Pa. St. 436; *Freem. Judgm.* § 154; *Sherman v.*

Proprietors of Connecticut Bridge, 11 Mass. 338; *Guinard v. Hey-singer*, 15 Ill. 288.

We do not think that the unsuccessful attempt made in the district court to substitute the board of education for the school-district affects the original judgment. That judgment is binding upon the defendant, and the relief asked for in the subsequent proceeding may have been regarded by the district court as wholly useless and unnecessary. We perceive no injustice in requiring the defendant to pay for the school furniture which it has received and appropriated for public school purpose. Upon the record, the agreed statements of the parties, and the evidence before us, the peremptory writ of *mandamus* will be awarded as prayed for.

(All the justices concurring.)

(33 Kan. 634)

DRAKE v. FIRST NAT. BANK OF FORT SCOTT.

Filed June 4, 1885.

1. PLEADING—CONTRACT—ACTION ON—REFORMATION.

Where a plaintiff commences his action upon a written contract, and does not ask to have the contract reformed, and does not allege any grounds of accident, surprise, or mistake, authorizing the reformation of the contract, nor any matters that could possibly change the meaning of its terms, *held*, that allegations of what the parties intended or desired, or why they made the contract, or why they made it as it was made, and what the parties understood and agreed to be its "legal purport and effect," are irrelevant and redundant—mere surplusage.

2. SAME—AMENDING PETITION.

In such a case, the trial court may, in its discretion, order the plaintiff to so amend his petition as to strike out these irrelevant and redundant allegations.

3. SAME—FAILURE TO AMEND—DISMISSAL.

In such a case, where the plaintiff fails and refuses to so amend his petition, the court may, in its discretion, dismiss the plaintiff's action.

Error from Bourbon county.

A. A. Harris, for plaintiff in error.

Ware & Ware and J. D. McCleverty, for defendant in error.

VALENTINE, J. On April 4, 1883, an action was pending in the district court of Bourbon county, wherein C. F. Drake was the plaintiff, and the First National Bank of Fort Scott, Kansas, was the defendant. On that day the defendant filed two motions: one asking the court to require the plaintiff to amend his amended petition so as to make it more definite and certain in certain particulars, and the other asking the court to require the plaintiff to further amend such petition by striking out certain alleged surplus and redundant matters therein contained. On May 23, 1883, these motions were heard, and both of them were partially sustained and partially overruled, and the plaintiff was required to amend his amended petition so as to make it correspond to the orders of the court made on said motions, and 60 days were given him within which to so amend. The plaintiff, however, did not amend in any particular, and for that reason the court below, at the September term, 1883, dismissed his action. The orders of the court below partially sustaining the defendant's mo-

tions, and dismissing the plaintiff's action, were duly excepted to by the plaintiff, and to reverse these orders the plaintiff, as plaintiff in error, on August 12, 1884, brought the case to this court.

It is conceded by the plaintiff that if the motions were properly sustained, the court below committed no error in dismissing his action; but it is claimed by him that the motions were erroneously sustained. The plaintiff, in his brief in this court, states that the only question now submitted for determination is whether or not the said motions were rightfully sustained. The defendant, however, does not admit that this is the only question, but suggests that there are still others to be determined. We shall consider only the question presented by the plaintiff; for even upon that question we think the decision of this court must be in favor of the defendant. This question, however, involves several others, some of which we do not think will require any consideration. For instance, we do not think that it is necessary to enter into any consideration as to whether the court below erred or not in requiring the plaintiff to so amend his amended petition as to make it more definite and certain in certain particulars; for a decision of the other questions involved in the case will require an affirmance of the final decision of the court below, in whatever way this question of definiteness or certainty in the petition, or want of the same, might be decided; and besides, the consideration of this question would involve the consideration of many difficult and intricate questions which may never again arise. The principal question which we shall consider is whether the court below erred in requiring the plaintiff to amend his amended petition by striking out certain alleged surplus and redundant matters.

The plaintiff's action is founded upon the following instruments in writing, to-wit:

"The First National Bank. \$5,500. Fort Scott, Kansas, October 18, 1880. C. F. Drake has deposited in this bank fifty-five hundred dollars, payable to the order of A. A. Harris, trustee, on return of this certificate properly indorsed.

[Signed]

"C. F. MARTIN, Assistant Cashier."

"When the First National Bank of Fort Scott, Kansas, at any time after November 1, 1880, and up to December 1, 1880, shall convey, by good and sufficient quitclaim deed or deeds, free and clear of all tax liens and incumbrances, including the taxes of 1880, all the real estate included in the real-estate account of said bank, and the same referred to in an agreement made September 25, 1880, by and between W. Chenault and C. F. Drake, then A. A. Harris, trustee, shall indorse the same to said bank. But if said bank shall not properly and legally execute and deliver such deed or deeds as is herein mentioned as to such real estate, then said Harris, as trustee, shall indorse this certificate and deliver the same to C. F. Drake, who, in that event, shall be authorized to receive the money thereon.

"This stipulation and agreement consented to by said Drake, said Chenault, and said bank, all of whom agree to carry out its provisions, so far as the same may devolve upon them, respectively, this October 18, 1880.

[Signed]

"C. H. OSBUN, Cashier.

"W. CHENAULT.

"C. F. DRAKE."

The plaintiff, in his amended petition, alleges, in substance, that at the time when these instruments were executed W. Chenault was the president of the First National Bank, C. H. Osburn was the cashier, and C. F. Martin was the assistant cashier; that the second instrument was attached to the first, and was a part thereof; or, in other words, that the two instruments in effect constituted only one instrument; that on December 1, 1880, the real estate therein mentioned was of the value of \$9,500; "that on the first day of December, 1880, and prior and subsequent thereto, he [the plaintiff] demanded of the defendant that it execute and deliver to him the deed or deeds to said lands and real estate, as in said instrument agreed, and that said Harris, as trustee, offered to indorse the said certificate of deposit to the defendant; that defendant could have made the deed or deeds as agreed, but, wholly disregarding its obligation and agreement, it failed and refused so to do, and conveyed the same to other and different parties;" wherefore, the plaintiff was damaged in the sum of \$4,000, for which he prays judgment against the defendant.

Nothing is said in the plaintiff's pleadings as to what had become of the certificate of deposit, as to whether it had been assigned or not, or collected or not, or who held it or owned it, or whether, at the time when the bank sold and conveyed the land in question to other parties, it was then in such a condition or in such hands that it could have been assigned or delivered by either Harris or Drake to the bank. The plaintiff has carefully refrained from alleging that he was the owner or holder of the certificate of deposit, or even that Harris still held it; but, for the purposes of this case, we shall assume that after the bank's failure and refusal to execute the deed or deeds to Drake, Harris indorsed and delivered the certificate of deposit with the other instrument to Drake, and that the two instruments still remain in Drake's possession, unsatisfied, uncollected, and owned by him.

The supposed irrelevant and redundant matter contained in the petition is as follows:

"At that time there were some taxes, the exact amount of which is not known to the plaintiff, due on said lands and real estate, and which were a lien thereon. The defendant desired an opportunity of paying or compromising said taxes, before it should finally make the deed or deeds to plaintiff, and it was agreed by and between plaintiff and defendant that the defendant should have such opportunity. At that time the plaintiff had on deposit some eight or nine thousand dollars of his money with the defendant.

"The parties mutually desired some evidence that each would perform his and its part of the contract of sale, and it was mutually agreed that \$5,500 of the money which plaintiff had on deposit with the defendant should be placed to the credit of A. A. Harris, as trustee, to remain with the defendant according to the term of a certain certificate of deposit then issued and executed by the defendant for that purpose; the plaintiff giving to the defendant his check for said amount of \$5,500.

"Plaintiff says that said instrument and agreement was intended, by and between the parties thereto, to be an agreement and contract on the part of

the defendant to convey to the plaintiff all lands and real estate therein referred to, on or before December 1, 1880, and such was understood and agreed to be its legal purport and effect by the plaintiff and defendant at the time of its execution."

This matter is evidently redundant and irrelevant—mere surplusage. The petition is no better with it than without it, and the court below did not err in ordering it to be stricken out. The plaintiff does not ask to have the written instruments, or either of them, or the contract embodied therein, reformed, and alleges no grounds of accident, or surprise, or mistake authorizing the reformation of such contract, nor any matters that could possibly change the meaning of its terms in any respect whatever. The parts stricken out are merely averments of non-essential facts, of what the parties intended and desired, and why they made the contract, and why they made it as it was made, and what the parties understood and agreed to be its "legal purport and effect." Such averments cannot change the terms of the written contract, nor affect the rights of the parties thereunder. The rights of the parties are governed by the terms of the written contract. The court, however, in its discretion, might have permitted these averments to remain as a part of the petition; but also, in its discretion, it had a right to order them to be stricken out; and as it had such right and made such order, and as the plaintiff failed to obey the order, the court undoubtedly had the right to dismiss the action for that reason, as it did. The order requiring the plaintiff to strike out these irrelevant matters was a separate and distinct order, and the plaintiff could have obeyed it without obeying any other order of the court. But the plaintiff failed and refused to obey this order, or any part thereof, and failed and refused to obey all orders; and for that reason his case was dismissed, and he must now abide the consequences.

The judgment of the court below dismissing the plaintiff's action will be affirmed.

(All the justices concurring.)

(33 Kan. 621)

FEINEMAN and others v. SACHS.

Filed June 4, 1885.

1. SALE OF LIQUOR CONTRARY TO LAW—ENFORCEMENT OF CONTRACT.

The courts of our state are not bound to recognize or enforce a contract which is in contravention of our statutes, even though it may be valid in the state where it is made. And if a wholesale liquor dealer in Missouri enters into an agreement with a citizen of Kansas to sell and ship intoxicating liquors to him in Kansas, for the express purpose of enabling the purchaser there to resell the liquors, contrary to the laws of the state, and actively aids the purchaser in the illegal traffic, he is not entitled to the assistance of our courts in recovering the price of the liquors thus sold.

2. SAME—KNOWLEDGE OF VENDEE.

Mere knowledge of the illegal purpose of the buyer is not sufficient to invalidate a sale made in Missouri, which is in conformity with the laws of that state. In order to render the sale void and defeat a recovery of the price of the liquors,

there must be some participation or interest of the seller in the illegal transaction.

3. PRACTICE—INSTRUCTION—EVIDENCE.

It is error for the court to give an instruction founded upon facts that are not in proof.

Error from Shawnee county.

W. A. S. Bird, for plaintiffs in error.

G. C. Graves, for defendant in error.

JOHNSTON, J. B. A. Feineman & Co. brought this action against Frank Sachs to recover the price of a quantity of intoxicating liquors sold by them to the defendant, who was a saloon-keeper, at Topeka, Kansas. The plaintiffs are wholesale liquor dealers at Kansas City, Missouri, and they allege that on the seventeenth day of August, 1881, they sold on credit and shipped a bill of liquors, priced at \$223.33, to one C. G. Funk, at Topeka; that a short time after this sale Funk sold out his business to the defendant Sachs, when he assumed the payment of Funk's indebtedness to the plaintiffs; that afterwards the defendant purchased liquors directly from plaintiffs of the amount of \$75.75,—making a total indebtedness alleged to be due from defendant to plaintiffs of \$299.08; that the defendant had made several payments on account to the amount of \$150, leaving a balance due to the plaintiffs of \$149.08, for which they ask judgment.

The defendant denied the assumption of Funk's indebtedness to plaintiffs, and claimed that when he bought Funk out a number of outstanding accounts were left by Funk with him for collection, with the agreement that the amount collected upon them should be paid to Feineman & Co. upon the bill that Funk owed them. He claims that on these accounts he collected about \$75, all of which was paid over to the plaintiffs, and that the balance of \$150, which he had remitted to the plaintiffs, was in full payment of the liquors purchased by himself from them. He made the further defense that the liquors were sold by the plaintiffs at Topeka, Kansas, contrary to the laws of this state, and with full knowledge that they were to be resold by the defendant, and in violation of our law, and therefore no recovery could be had for their price. On the trial a general verdict was returned by the jury in favor of the defendant.

One of the errors assigned by the plaintiffs is upon the instructions that were given to the jury. The court directed the jury that if the plaintiffs' agent took an order from the defendant for intoxicating liquors to be transmitted to the plaintiffs at Kansas City, Missouri, and there filled at their option, and to be delivered at that place to the defendant, the plaintiffs would be entitled to recover the amount unpaid thereon, but that if the sale and delivery of the liquors was made at Topeka, Kansas, no recovery could be had unless the plaintiffs had a permit authorizing such sale. The court then gave the following instruction:

"I further instruct you that if you find as a fact that the plaintiffs' agent took from the defendant an order for intoxicating liquors in the city of To-

peka, with the understanding and agreement that said order should be transmitted to plaintiffs in Kansas City, Missouri, to be there filled subject to their choice and option, and that said liquors were delivered to the defendant on the cars at Kansas City, Missouri, to be brought into this state; and if you further find that at the time of such transaction it was the understanding and agreement between the defendant and plaintiffs' agent that such liquors were to be brought into the state of Kansas, and here resold, in violation of the laws of this state, and if you further find that the agreement of transmission and filling of the order at the plaintiff's option, and the delivery of the liquors to the defendant on the cars at Kansas City, Missouri, was so made as a scheme or device for evading the laws of Kansas respecting the sale of intoxicating liquors in this state, and that such liquors were so furnished defendant in pursuance of such scheme or device, to be resold in Kansas in violation of the laws of this state,—then you must find for the defendant."

Exception is taken to this instruction upon two grounds—*First*, that it is not a correct statement of the law; and, *second*, that there was no evidence in the case upon which to base such an instruction. As an abstract proposition of law we think the instruction is not erroneous. The plaintiffs claim that the validity of a sale and delivery of goods made in Missouri is to be determined by the laws of that state, and that, as the contract in question conformed to the laws of Missouri, it cannot be affected by our laws, and must be enforced in our courts. It is true, the general rule is that the validity of a contract is to be determined by the law of the place where it is made, and if it is valid by the laws of that state it will be enforced in another as an act of comity, even though it may not entirely consist with the laws of the state in which enforcement is sought. To this rule there are important exceptions, one of which is that no state is bound to enforce a contract that is in contravention of its laws, and which has been entered into in fraud or evasion of such laws.

It has been said "that the exception applies to cases in which the contract is immoral or unjust, or in which the enforcing it in a state would be injurious to the rights, the interest, or the convenience of such state or its citizens. This exception results from the consideration that the authority of the acts and contract done in other states, as well as the laws by which they are regulated, are not, *proprio vigore*, of any efficacy beyond the territories of that state; and, whatever effect is attributed to them elsewhere, is from comity, and not of strict right. And every independent community will and ought to judge for itself how far that comity ought to extend. * * * Contracts, therefore, which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects; contracts against good morals, or against religion, or against public rights; and contracts opposed to the national policy or national institutions,—are deemed nullities in every country affected by such considerations, although they may be valid by the laws of the place where they are made." Story, Conf. Laws, § 244. And citizens of another state who enter into an arrangement to furnish liquor with the intention and for the purpose of enabling a citizen of Kansas to violate our laws are not entitled to any

greater privilege than any one of our own citizens, guilty of the same wrong. If, then, the transmitting of the order for intoxicating liquors to Kansas City, Missouri, and the delivering of them upon the cars at that place was, as stated by the court, a mere scheme or device of the parties to evade the laws of Kansas prohibiting the sale of intoxicating liquors, and the plaintiffs encouraged and assisted the defendant in the illegal transaction, the courts of the state will not aid the plaintiffs in recovering the fruits of such wrongful act.

But the other exception to the instruction is, in our view, well taken. No facts are found in the evidence brought here upon which to base the instruction, and it was therefore misleading and erroneous. The most that can be claimed, as shown in the testimony, is that the plaintiffs' agent knew that the defendant had sold liquors in violation of law, and that the intention of the defendant was to dispose of those purchased from plaintiffs in the same way. There is no pretense that any act was done by the plaintiffs to promote the illegal transaction, or that they shared in its fruits beyond the taking of the order and sale of the goods for their value in the state of Missouri. It does not appear that anything was said or done by the plaintiffs or their agent indicating an arrangement or conspiracy with the defendant to evade the laws of the state, or with a view of facilitating and assisting the defendant in the illegal sale of the liquor, or in furtherance of his unlawful design. And while the defendant at the time of the purchase may have intended to do an unlawful business in Kansas, and that purpose may have been communicated to and known by the plaintiffs, yet the defendant might afterwards change his purpose and make a proper and legal disposition of the liquors. But mere knowledge of the illegal purpose of the buyer is not sufficient to invalidate a sale made in Missouri, and which is in conformity with the laws of that state. In order to render the sale void and defeat a recovery of the price of the liquors there must be some participation or interest of the seller in the act itself. *Hill v. Spear*, 50 N. H. 253; *Holman v. Johnson*, Cowper, 341; *Gaylord v. Soragen*, 32 Vt. 110; *Aiken v. Blaisdell*, 41 Vt. 656; *McIntyre v. Parks*, 3 Metc. 207; *Smith v. Godfrey*, 28 N. H. 379; *Orcutt v. Nelson*, 1 Gray, 536; *President, etc., of Merchants' Bank v. Spalding*, 12 Barb. 302; *Tracy v. Talmage*, 14 N. Y. 162.

If, however, there has been any participation on the part of the plaintiffs,—as for instance, if the liquors were packed by the plaintiffs in such a manner as to conceal the contents of the package, and thus enable the defendant to accomplish his unlawful purpose,—no recovery can be had; and if the illegal disposition of the goods by the purchaser in any way entered into the contract, and a greater price was agreed to be paid for them; or if the plaintiffs were to derive any advantage or share in the fruits of the defendant's wrong,—the contract should be held void and not enforceable in our courts. But as there was no testimony in the case that the plaintiffs participated

or were interested in the illegal sale of the goods, the instruction cannot be sustained. It follows that the judgment of the district court must be reversed, and the case remanded for a new trial.

(All the justices concurring.)

(33 Kan. 609)

WILLIAMS v. MOOREHEAD and another, Partners, etc.

Filed June 4, 1885.

1. JUDGMENT BY DEFAULT—SERVICE BY PUBLICATION.

Where service by publication is made against a defendant who is a non-resident, in a case authorized by the statute, in the manner and for the time prescribed by the statute, and such service is proved by the affidavit of the printer knowing the same, and is filed in the court, but the court does not examine or inspect the service or the proof thereof, the judgment by default, rendered against the defendant upon such service, is not void, nor subject to successful attack collaterally.

2. TRIAL—SUPPLEMENTAL PETITION—EVIDENCE.

A plaintiff, with the consent of the court, may file a supplemental petition, alleging facts material to the case occurring after the filing of his original petition; and upon the trial he may establish the allegations in his supplemental petition, although they differ and contradict, in some respects, the former petition filed by him.

Error from Washington county.

Action commenced by William Moorehead and E. C. Knowles, partners as Moorehead & Knowles, against Charles Mount, February 9, 1882, to quiet title to the S. $\frac{1}{2}$ of section 4, in township 3 south, of range 2, Washington county, which they claimed to own and to be in the actual possession of under a tax deed executed February 5, 1880. Service had upon Mount by publication. At the April term of the court for 1882, Israel Williams made application to be made a defendant, and also for leave to answer. All of this was granted, over the objection of Moorehead & Knowles. On the same day, April 8, 1882, judgment was rendered by default in favor of plaintiffs against Mount. To this Williams objected, and then excepted. On May 18, 1882, Williams filed his answer to the petition of plaintiffs, and, among other things, alleged therein that he was the owner in fee simple of the lands described in the petition, and that the tax deed under which the plaintiffs claimed possession and title was void. On June 26, 1882, the plaintiffs filed their motion to require Williams to make his answer more definite and certain. This motion was sustained by the court, and on September 16, 1882, Williams filed an amended answer, setting forth in great detail the alleged irregularities in the tax proceedings and tax deed under which the plaintiffs claimed title. At the August term of the court for 1882, Charles Mount filed his application to have the judgment rendered against him on April 8, 1882, opened up, and to be let in to defend. It was agreed between the plaintiffs and Mount, over the objection of Williams, that the judgment rendered against Mount should be set aside and that he be allowed to answer. On September 26, 1882, plaintiffs

filed their reply to the answer of Williams, containing a general denial of the allegations therein contained. On September 11, 1882, Mount filed his answer to the petition of plaintiffs, alleging, also, that the tax deed of plaintiffs was invalid, and that he was the owner in fee of the premises. On September 16, 1882, Williams filed answer to answer of Mount. On December 12, 1882, Mount replied to the answer of Williams. On April 24, 1883, Moorehead & Knowles, by permission of the court, filed a supplemental petition, setting forth that since the commencement of the action, and after Williams had been made a party, they had purchased and were in possession of the claim, interest, and estate of Charles Mount to the premises in controversy; that Mount's title, which they had purchased, arose by virtue of a certain sheriff's deed to said land made to Mount on August 6, 1878, by the sheriff of Washington county in a certain attachment proceeding of said Mount against Elias W. Tuttle, and also by virtue of a certain decree obtained by Mount in the district court of Washington county, on April 10, 1880, against William Wallenweber, forever barring him from all interest in or claim to the land, and decreeing Mount to be the owner thereof. This supplemental petition also alleged that Williams' claim of title to the land was solely by virtue of a deed made to him by said Wallenweber long subsequent to said decree. On April 18, 1884, Williams filed an answer to the supplemental petition, alleging that the decree referred to in said petition as having been made on April 10, 1880, in an action pending in the district court of Washington county, wherein Charles Mount was plaintiff and William Wallenweber was defendant, pretending to quiet title to the land in dispute, was fraudulently and wrongfully obtained, and therefore was void as against him. At the April term of court for 1884, the case came on for trial before the court, without a jury. The court made the following findings of fact:

(1) That it is agreed between all the parties to this action that the original patent title to the land in controversy in this action,—viz., the south one-half of section 4, in township 3 south, of range 2 east, in Washington county, Kansas,—was formerly in Elias W. Tuttle, and that at the time this action was commenced, plaintiffs were in the actual possession of said premises.

(2) That on the fifth day of June, A. D. 1876, said Elias W. Tuttle and wife conveyed said land by warranty deed to Alfred Hawkins, which deed was filed for record, February 20, 1882.

(3) That on the sixth of May, 1878, said Hawkins and wife conveyed said land by warranty deed to William Wallenweber, which deed was filed for record, October 26, 1878.

(4) That on the fifth day of January, 1882, said Wallenweber and wife conveyed said land by warranty deed to defendant Israel Williams, which deed was filed for record, February 20, 1882.

(5) That on the fifth day of February, 1880, a tax deed was issued from Washington county, Kansas, to Charles L. Flint, which was filed for record, February 7, 1880.

This tax deed was based upon a sale of said land for taxes of the year 1875, which sale was made in the year 1876. The amount necessary to redeem at

the date of the making of the said tax deed was \$72. December 3, 1880, said Charles L. Flint conveyed said land by quitclaim deed to J. W. Rector, which deed was filed for record, February 16, 1880.

February 1, 1882, said premises were conveyed by said J. W. Rector and wife to plaintiffs, which deed was filed for record, May 11, 1882.

In regard to this tax sale of 1876 for the delinquent taxes of 1875, the court finds that the said land was sold for \$16.50, while the legal amount of taxes, penalties, interests, costs, and charges, including costs of sale, was only \$16.35; and that in addition to this, that the county board duly contracted to pay and only paid the printer, for publishing the delinquent tax-sale list for that year, 20 cents per tract, while the treasurer collected 25 cents per tract, which would further reduce the amount, for which said lands should have been sold to \$16.30, so that said land was sold for 20 cents more than it should have been sold for.

(6) That on the twenty-third day of March, 1878, a suit was commenced against said Elias W. Tuttle in the district court of this Washington county, by one Charles Mount. On the same day an affidavit for attachment was filed on the ground of the non-residence of said Tuttle, and on the same day an order of attachment was issued to the sheriff, which order was returned March 29, 1878, showing that the lands in question in this suit had been attached March 28th.

An affidavit for service by publication was made and proof of the same was filed July 30, 1878. The proceedings to obtain service by publication were regular in every respect, and also the publication was regularly made, and the proper proof filed by the printer. This proof was not examined by the court, and was therefore neither approved nor disapproved by the court. Judgment was rendered in this case August 6, 1878, by default, against said Tuttle and in favor of said Mount, for \$6,395, with interest at 10 per cent. per annum from the date of said judgment, and the property in question ordered sold to satisfy said judgment.

An order of sale was issued October 10, 1878, and returned December 7, 1878, showing a sale of the lands in controversy to said Charles Mount, who was the judgment creditor. The consideration paid by said Mount was \$430. The motion to confirm this sale was filed by Mount, December 7, 1878, and allowed on the same day, and an order of confirmation entered, and a sheriff's deed to said Mount was made January 24, 1879, which was filed for record, January 24, 1879.

(7) That before Mount had purchased the land in question at sheriff's sale in the attachment suit, he had actual notice that William Wallenweber claimed to own the land.

(8) That on the twelfth day of February, 1880, an action was brought by Mount against Wallenweber in this court to quiet his title to said land against said Wallenweber. The land at this time was vacant and unoccupied.

Service in said case was made by publication, upon proper affidavit being filed, showing the non-residence of Wallenweber and the other statutory grounds required; the proper notice was published for four consecutive weeks in a newspaper printed, published, and of general circulation in said county, the dates of publication being February 13, 20, 27, and March 5, 1880. The affidavit of the printer in proof of such publication was filed in manner and form as required by law. Although this proof was not examined, and therefore not approved or disapproved by the court, a decree was entered in said case quieting said Mount's title to said premises by default, on the tenth of April, 1880.

(9) July 24, 1882, Mount and wife executed quitclaim deed for said premises to plaintiffs, which was filed for record April 24, 1883.

Thereon the court made the following conclusions of law:

As conclusions of law from the foregoing facts, the court finds that the plaintiffs are entitled to have their title quieted to said premises as against said defendant. (2) That the costs in this case should be paid by defendant, Israel Williams.

Williams filed a motion for a new trial, alleging that the conclusions of law by the court, from the facts found, were inconsistent with and not supported by the said findings; that upon the findings made by the court he was entitled to judgment and decree quieting the title in him as to the lands in question; and also moved the court for judgment, upon the findings of fact, in his favor. These motions were overruled by the court, Williams excepting. He thereupon moved the court to set aside the sixth, seventh, eighth, and ninth findings of fact upon the ground that the findings of fact were not supported by sufficient evidence, and were contrary to the evidence; and also embraced therein a motion for a new trial upon the errors of law occurring upon the trial, and for erroneous conclusions of law. These motions were overruled, Williams excepting. Thereupon the court rendered its judgment and decree in said cause in favor of the plaintiffs and against the defendant, Williams. The plaintiffs were also given judgment for costs against the defendant, Williams, taxed at \$26.75. Williams excepted, and brings the case here.

Lowe & Smith, for plaintiff in error.

J. W. Rector, for defendants in error.

HORTON, C. J. The common source of title of the land in controversy was from Elias W. Tuttle. Upon the trial, Moorehead & Knowles, in support of their case, introduced a tax deed executed to Charles L. Flint, February 5, 1880; a quitclaim deed from Charles L. Flint to J. W. Rector, executed December 3, 1880; a warranty deed from J. W. Rector and wife to William Moorehead and E. C. Knowles, executed February 1, 1882; a sheriff's deed, executed January 24, 1879, to Charles Mount, reciting a judgment in favor of Charles Mount against Elias W. Tuttle, dated August 6, 1878, and a sale of the real estate under said judgment on November 23, 1878; also the proceedings in an attachment commenced March 23, 1878, by Charles Mount against Elias W. Tuttle, including the judgment rendered in such case on August 6, 1878; the proceedings in the action of Charles Mount against William Wallenweber, commenced February 12, 1880, to quiet title, and in which action Charles Mount obtained such a decree on April 6, 1880; and, lastly, a quitclaim deed from Charles Mount and wife to William Moorehead and E. C. Knowles, executed July 24, 1882.

On the part of Williams it is contended that the tax proceedings for the years for which the land was sold were so irregular and defective that the tax deed of February 5, 1880, conveyed no title. Williams' claim of title, introduced in evidence, was as follows: A warranty deed from Elias W. Tuttle and wife to Alfred Hawkins, executed June 5, 1876, but not filed for record until February 20,

1882; a warranty deed from Alfred Hawkins and wife to William Wallenweber, executed May 6, 1878 and filed for record October 26, 1878; and a warranty deed from William Wallenweber and wife to Israel Williams, executed January 5, 1882, and recorded February 20, 1882.

No claim is made before us that the tax deed of February 5, 1880, is valid, or that Moorehead & Knowles have any title thereunder. As Elias W. Tuttle conveyed the premises to Alfred Hawkins before Charles Mount commenced his attachment proceedings against said Tuttle, and as the findings show that Charles Mount had actual notice that William Wallenweber, the purchaser from Hawkins, claimed to own the land at the time that Mount purchased the land at sheriff's sale, we may assume, at least for the purposes of this case, that Mount was not a purchaser without notice, although the sheriff's deed was recorded January 24, 1879, and the conveyance from Tuttle to Hawkins was not recorded until February 20, 1882. *Bush v. Bush*, 33 Kan. —; S. C. 6 PAC. REP. 794; *Holden v. Garrett*, 23 Kan. 98; Comp. Laws 1879, § 21, c. 22; Freem. Ex'ns, § 336; 2 Lead. Cas. Eq. pt. 1, pp. 94-95; *Davis v. Owenby*, 14 Mo. 170; *Chapman v. Coats*, 26 Iowa, 288; *Hoy v. Allen*, 27 Iowa, 208.

Mount, however, had the legal right to contest the alleged claim and title of Wallenweber in a direct proceeding brought therefor.

This conclusion leads up to the inquiry of the validity of the judgment quieting title in Charles Mount, rendered April 6, 1880. As Williams did not attempt to purchase from Wallenweber until January 5, 1882, Williams obtained no title or interest in the property attempted to be conveyed to him on said date, if the judgment of April 6, 1880, decreeing that Wallenweber had no legal or equitable estate in the property so conveyed, is to be given full force and effect. The finding of the court in regard to this matter is as follows:

"That on the twelfth day of February, 1880, an action was brought by Mount against Wallenweber in this court to quiet his title to said land against said Wallenweber, and the land at the time was vacant and unoccupied. Service in said case was made by publication, upon proper affidavit being filed, showing the non-residence of Wallenweber and the other statutory grounds required. The proper notice was published for four consecutive weeks in a newspaper printed, published, and of general circulation in said county, the dates of publication being February 13, 20, 27, and March 5, 1880. The affidavit of the printer in proof of such publication was filed in manner and form required by law. Although this proof was not examined, and therefore not approved or disapproved by the court, a decree was entered in said case quieting said Mount's title to said premises by default, on the tenth of April, 1880."

The decree in the case commences as follows:

"And now, on this sixth day of April, of the April term, A. D. 1880, of this court, and on the tenth day of said month, this cause comes on regularly for hearing. The plaintiff appears by J. W. Rector, his attorney of record. The court finds that due and legal notice for the time and in the manner prescribed by law has been had, and service made in this action by newspaper publica-

tion upon said defendant, William Wallenweber; he being then and ever since a non-resident of and absent from the state of Kansas, so that service of summons in this action could not be made upon him within the state of Kansas; and this being an action in which service and notice by publication upon a non-resident defendant is proper and authorized by law,—yet said defendant has failed to answer or demur to plaintiff's petition herein, or to appear in any way, but made and still wholly makes default herein," etc.

Service was actually made in the case and filed. The only evidence offered tending to show that proof of service was not examined by the court was the testimony of J. G. Lowe, one of the attorneys for Williams. He testified, among other things:

"That I examined the papers in the case of *Charles Mount v. William Wallenweber*; that the affidavit of proof of publication of service did not have any indorsement that it had ever been approved by the court and ordered filed; nor were there any papers in the case showing that the court had ever examined the service of proof thereof and approved it. I am well acquainted with the practice in this court about such matters, and have been for ten years. I know that at the time the case was heard that it was not, and never had been, the practice of the court either to examine or approve the service by publication, or the affidavit proving such service, and that it was not done in that case."

Upon this oral evidence and the finding of the court, it is contended on the part of Williams that all the proceedings in the action of *Mount v. Wallenweber* to quiet title are void; hence that no title passed to the premises from Mount to the plaintiffs. The claim is that the district court of Washington county never acquired jurisdiction in the case of Mount against Wallenweber to render the judgment therein, *because proof of service was not inspected or approved by the court*. The following provision of section 75 of the Code is cited:

"No judgment by default shall be entered on such service until proof thereof be made, and approved by the court, and filed."

Counsel, however, fail to quote in their brief all of said section 75. It reads as follows:

"Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section; and such service shall be proved by the affidavit of the printer, or his foreman or principal clerk, or other person knowing the same. No judgment by default shall be entered on such service until proof thereof be made, and approved by the court, and filed."

Without, at this time, passing upon the question whether the finding and judgment of the court can be impeached by oral evidence, we are of the opinion that, as service by publication was made upon Wallenweber in the manner and for the time prescribed by section 74 of the Code, and as such service was proved in accordance with the provisions of the statute and afterwards filed, the failure of the court to examine or inspect the proof thereof, or to further approve the same, did not defeat or set aside such service. We say, "to further approve the proof of service," because, notwithstanding the oral evi-

dence, and the finding of the trial court, it appears from the recitations of the decree that the court found "that due and legal notice for the time and in the manner prescribed by law had been had, and service made in the action, by publication upon the defendant Wallenweber." Although there was no actual examination or inspection of the proof of service under the evidence and findings of the court, and although we have no order of the court entered on the minutes approving the proof of service and ordering the same to be filed, there was a recitation in the decree of approval of the proof of service; therefore we do not consider said judgment void, or liable to be successfully attacked collaterally. *Foreman v. Carter*, 9 Kan. 674; *Pierce v. Butters*, 21 Kan. 124.

The failure of the court to more fully "approve the proof of service," when it appears that the service was regular and sufficient in all other respects, is, at most, an irregularity—not an omission—that will oust the court of jurisdiction and render its judgment a nullity. Under the terms of said section 75, in all cases where judgments are rendered by default upon service by publication, it would be good practice for the court to enter on its minutes approval of the proof of service, and order the same to be filed; but its omission so to do is not fatal to the jurisdiction of the court.

Complaint is made that the court erred in rendering judgment against Williams for all the costs. We think this complaint is well taken as to such costs as accrued before Williams was let in to defend, and the judgment as to the costs will be modified accordingly. The other alleged errors need only be noted briefly. Williams is in no situation to complain of the action of the district court in opening up the judgment obtained by default by Moorehead & Knowles against Mount. Moorehead & Knowles had the right to waive the statute and consent to an answer being filed.

Section 144 of the Code authorizes the court to allow a plaintiff to file a supplemental petition alleging facts material to the case occurring after the former petition; therefore, when Moorehead & Knowles became the owners of the title of Charles Mount, subsequent to the commencement of the action, they had the right, with the consent of the court, to file the supplemental petition setting up their claim under such title, notwithstanding the allegations of such supplemental petition were in conflict with the original petition filed by them.

This case was virtually disposed of upon the supplemental petition, and the answer of Williams thereto. Before Mount brought his action against Wallenweber to quiet his title, he had obtained a sheriff's deed. He knew then that Wallenweber made some claim to the land; but Wallenweber, if he had title at all, must have derived the same through Tuttle; Tuttle's conveyance was not recorded until February 20, 1882, long after the institution of the attachment proceedings and the suit to quiet title; therefore he brought his action properly against Wallenweber to determine whether the latter had

any interest in the land. *Douglass v. Nuzum*, 16 Kan. 515. The judgment was properly rendered; and it is too late for Wallenweber, or any person claiming from him, to object in a collateral proceeding.

The judgment of the district court will be affirmed, except that all costs which accrued prior to the time that Williams became defendant will be taxed to Moorehead & Knowles.

(All the justices concurring.)

(38 Kan. 590)

WOOD v. NATIONAL WATER-WORKS CO. OF NEW YORK.

Filed June 4, 1885.

1. MUNICIPAL CORPORATION—PLAT OF TOWN OR CITY—DEDICATION OF STREET—CONTROL OF STREETS—WATER-MAINS.

Where a proprietor, laying off any city or town, or an addition to any city or town, under the provisions of chapter 78, Comp. Laws 1879, makes out a map or plat thereof, and reserves for public uses streets and alleys, and acknowledges, certifies, files, and records the same with the register of deeds of the county in which such city or town or addition is situate, the fee of the streets and alleys dedicated to public use vests absolutely in the county wherein such real estate lies, and the county forever afterwards holds the property in trust for such use; but the city has control over it as another agent of the public; and such streets and alleys, under the direction and control of the public authorities, is subject to be appropriated to all the uses to which the streets of a city are usually devoted, as the wants or conveniences of the people may render necessary or important. One of these uses is the laying down of water-pipes to supply the inhabitants with water.

2. SAME—RESERVATION IN PLAT.

Where a proprietor has thus made, acknowledged, certified, filed, and recorded a map and plat of city lots, and thereby, within the terms of the statute, made a complete dedication of the streets and alleys, a note or reservation written upon the map or plat, and signed by him in the following terms: "It is hereby expressly understood that no right or privilege whatsoever is hereby granted, conveyed, or dedicated to any purchaser, excepting the simple easement or right of travel over said streets, avenues, or alleys; but that all other rights and privileges are hereby expressly reserved to the undersigned proprietors,"—is inoperative and void as against the public, and does not in any way deprive the public or the city of the usual and necessary control of the streets, avenues, and alleys.

Error from Wyandotte county.

On May 15, 1883, George B. Wood filed in the district court of Wyandotte county against the defendant, the National Water-works Company of New York, the following petition:

"And now comes the above-named plaintiff, George B. Wood, and for cause of action against the above-named defendant, the National Water-works Company of New York, a corporation duly organized under the laws of the state of New York, and avers that he has a legal estate in and is entitled to the possession of the land in James street, situated between Second and Fourth streets, in the city of Kansas, Kansas; that the said plaintiff owns the said land in fee-simple, subject to an easement or right of the public to travel over the surface of the same; that the said defendant, the National Water-works Company of New York, unlawfully keeps the plaintiff out of possession of said land below the surface of the said street.

"Wherefore, the plaintiff demands judgment that he have and recover said land from said defendant below the surface of the said street, and subject

only to the right of the public to travel over the said surface of said land, and that the defendant be excluded from any and all possession and estate in said land below the surface thereof.

"*Second count.* And, for a second cause of action in behalf of said plaintiff and against the said defendant, the plaintiff avers that the defendant is a corporation duly organized under the laws of the state of New York, and doing business as a water-works company in Jackson county, Missouri.

"That the plaintiff was, on the third day of May, 1869, and still is the owner and proprietor of the following-described real estate situated in Wyandotte county, Kansas, viz: All that parcel of land situated between Second street and Fourth street and the Kansas and Missouri rivers, now in the city of Kansas, Kansas.

"That on the said third day of May, 1869, the said plaintiff, being the owner in fee-simple and proprietor of the said land and other lands contiguous thereto, laid out and platted such land into town lots, made and caused to be made an accurate map or plat of such land into town lots, in which map or plat there was particularly set forth and described (1) all the parcels of ground within such town,—which town was known and designated in such map and plat as the city of Kansas, Kansas,—reserved for public purposes, by their boundaries, course, and extent, that were intended for avenues, streets, lanes, alleys, commons, and other public uses; (2) all lots intended for sale.

"That such map and plat was duly acknowledged, certified, filed, and recorded with the register of deeds of Wyandotte county, Kansas; that in the note accompanying such map and plat, and which note was also filed in such office and made a public record with the said plat, the said plaintiff, with other proprietors of land contiguous to the above-described land so platted, made the reservation of title in and to the land so designated as streets, as follows, to-wit:

" 'Know all men by these presents that we, George B. Wood and his wife, Annie B. Wood, D. E. James and his wife, Jennie James, and N. McAlpine, all of Wyandotte county, state of Kansas, proprietors of the several parcels of land as above described and set forth in this deed, and as shown by the accompanying plat, do hereby convey to the public, for their use, the streets, avenues, and alleys named in the foregoing description, according to the accompanying plat, to the extent that the said streets, avenues, and alleys are embraced upon said plat within the boundaries of the tracts owned by each of us individually, reserving to ourselves and our legal representatives all rights and privileges whatsoever in and upon said streets, avenues, and alleys. It is hereby expressly understood that no right or privilege whatsoever is hereby granted, conveyed, or dedicated to any purchaser excepting the simple easement or right of travel over said streets, avenues, or alleys, but that all other rights and privileges are hereby expressly reserved to the undersigned proprietors. Neither is there any right or privilege granted herein to the riparian rights of the Kansas river now owned by said proprietors, or to any ferry or bridge privilege whatsoever.

" 'In testimony whereof, the said D. E. James, his wife, Jennie James, George B. Wood, his wife, Annie B. Wood, and N. McAlpine and his wife, Maria W. McAlpine, have hereunto set their hands and seals this third day of May, A. D. 1869.

GEO. B. WOOD.	[Seal.]
" 'D. E. JAMES.	[Seal.]
" 'NICHOLAS McALPINE.	[Seal.]
" 'MARIA W. McALPINE.	[Seal.]
" 'ANNIE B. WOOD.'	[Seal.]

"And the plaintiff avers that in and by the terms and conditions of the said dedication and conveyance of said streets and other grounds marked on such plat, he only granted an easement or right to travel over such streets and re-

served all right and title to the soil into and below the said streets. And the plaintiff avers that James street, in said city, was one of the streets so dedicated. And the plaintiff further avers that in consequence of such original ownership and proprietorship in such land, he is the unlimited owner in fee-simple of the said streets, and was in the exclusive possession of said street, subject only to the easement or right of travel over the same. And plaintiff avers that being so in possession of the same, on or about the first day of November, 1882, the said defendants and its agents, servants, and employes, with force and arms broke into and upon the said premises, ground, and street so designated as James street, and between Second and Fourth streets, and dug up the soil and made deep ditches and excavations in said street so reserved by the plaintiff, and placed water pipes and mains in such ditch and still continues to use such ground for the purpose of conducting its water from its reservoir in Jackson county, Missouri, through, over, across, and under said streets in Wyandotte county, Kansas; that such unlawful breaking and entering upon said premises and land of this plaintiff was and is without the consent and against the will of this plaintiff; that in and by the said unlawful and forcible breaking and entry into and upon said premises the plaintiff has been damaged in the sum of twenty thousand dollars. Wherefore, the plaintiff demands judgment against said defendant for the sum of twenty thousand dollars, and costs of suit.

"STEVENS & STEVENS,
"Attorneys for Plaintiff."

On June 23, 1883, the defendant filed the following answer:

"And now comes the said defendant, the National Water-works Company of New York, and for an answer to the petition of the said plaintiff, George B. Wood, says: (1) That it denies each and every allegation in said petition contained, except what is hereinafter admitted, and that said defendant is a corporation as therein alleged; and of this it puts itself upon the country. And for further answer in this behalf, said defendant says: (2) That on or about the twentieth day of March, 1882, the city council of Kansas City, Kansas, it there and then being a municipal corporation and city of the second class, duly organized under the laws of the state of Kansas, did, by an ordinance duly enacted by the mayor and councilmen of said city, give and grant to said defendant, for a valuable consideration, the privilege and right to enter upon the streets, avenues, alleys, and other public grounds of said city, and lay therein its pipes for the conveyance of water to the citizens of said city; and that in pursuance of said grant said defendant, as it had a perfect right to do, did enter upon said streets, avenues, and alleys, and public places, and did at large expense lay therein water-pipes for the purpose above stated; and that this is the same trespass complained of in said petition, and has continued to enjoy the same ever since without any objections from the adjacent property owners. Said defendant further says that the pretended reservation contained in the dedication, as set out in said petition, is inconsistent with the grant to the public, and is absolutely void as against defendant; all of which said defendant is ready to verify.

"By KARNES & ESS and JAS. B. SCROGGS, its attorneys."

On June 26, 1883, the plaintiff filed the following demurrer to the second defense in defendant's answer:

"And now comes the said plaintiff, and, for a demurrer to the second defense in defendant's answer contained, says that the same does not state facts sufficient to constitute a defense to the plaintiff's cause of action as stated in his petition.

STEVENS & STEVENS.

"Attorneys for Plaintiff."

At the July term, for the year 1883, the case came on for hearing before the court upon the demurrer of plaintiff to the second defense in the answer. The same having been submitted to the court for decision, the court overruled the demurrer, and held that the second defense in the answer stated a good and sufficient defense to the petition.

To the order of the court overruling the demurrer, the plaintiff excepted and brings the case here.

Stevens & Stevens, for plaintiff in error.

Jas. B. Scroggs and Karnes & Ess, for defendant in error.

HORTON, C. J. The plaintiff, George B. Wood, being the owner of land now in part embraced by the city of Kansas, in this state, in 1869 platted such land into blocks, lots, streets, and alleys. He, with others who owned contiguous land, and who joined in the platting of the city, attempted to make an express reservation by a note upon the map and plat of the city signed by them, in the following language:

"It is hereby expressly understood that no right or privilege whatsoever is hereby granted, conveyed, or dedicated to any purchaser, excepting the simple easement or right of travel over said streets, avenues, or alleys; but that all other rights and privileges are hereby expressly reserved to the undersigned proprietors."

Subsequently the defendant was authorized by the city of Kansas to construct its water-mains through the soil below the streets of the city, and under such license proceeded to place the same under the streets, for the purpose of conducting its water from its reservoir in Jackson county, Missouri, into and through the city. The plaintiff alleges that the defendant has no right to enter upon the premises under the streets of Kansas City, without his consent, and that he has been damaged in the sum of \$20,000 by the alleged wrongful action of the defendant.

It is claimed upon the record that two questions are presented for decision: *First*, can the proprietor of land, platting and laying out the same into a city or town, under the provisions of sections 1 and 6 of chapter 78, Compiled Laws of 1879, reserve the fee-simple in the soil beneath the surface of the street so platted? *Second*, if this question be answered in the affirmative, then, under the language of the reservation in this case, had the defendant the right to enter upon such streets and excavate therein deep holes beneath the surface in which to lay its water-mains, through which to conduct water for sale where it might find a market for the same? In disposing of this case upon its merits, it is unnecessary to decide whether a proprietor platting a city, or a part thereof, may reserve his right to the minerals beneath the surface of the streets. *City of Dubuque v. Benson*, 23 Iowa, 248; *Tousley v. Galena M. & S. Co.* 24 Kan. 328.

In this case, the plaintiff did not reserve in himself the fee in the soil beneath the surface of the streets against the public generally;

but his reservation was that no right or privilege whatsoever was granted, conveyed, or dedicated to any "purchaser, excepting the simple easement or right of travel over said streets, avenues, or alleys." Conceding, for the purposes of this case, that the proprietor platting a city or town may reserve for himself the right to all the minerals beneath the surface of the streets and alleys, including the right of mining all subterraneous veins of ore, he cannot, in our opinion, lay out and plat a city, or a part thereof, dedicating the streets and alleys for public uses, under the provisions of said chapter 78, and by such a reservation, as is stated in the note written upon the map or plat filed by him, limit or interfere with the use of the streets, avenues, or alleys for public purposes.

Section 1 of said chapter reads:

"Whenever any city or town, or an addition to any city or town, shall be laid out, the proprietor or proprietors of such city or town, or addition, shall cause to be made out an accurate map or plat thereof, particularly setting forth and describing—*First*, all the parcels of ground within such city or town, or addition, reserved for public purposes, by their boundaries, course, and extent, whether they be intended for avenues, streets, lanes, alleys, commons, or other public uses; and, *second*, all land intended for sale, by numbers, and their precise length and width."

Section 6 is as follows:

"Such maps and plats of such cities and towns, and additions, made, acknowledged, certified, filed and recorded with the register, shall be a sufficient conveyance to vest the fee of such parcels of land as are therein expressed, named, or intended for public uses in the county in which such city or town, or addition, is situate, in trust and for the uses therein named, expressed, or intended, and for no other use or purpose."

Under the allegations in the petition, there was a perfect statutory dedication of the parcels of land named therein for public purposes. *City of Des Moines v. Hall*, 24 Iowa, 234. In this state, the fee of all real estate, when dedicated to public use by the proprietor of any city, vests absolutely in the county wherein such real estate lies, and the county forever afterwards holds the property in trust for such use. But the city has control over it as another agent of the public. *Railroad Co. v. Garside*, 10 Kan. 552. The power of the public over the streets of a city is not confined to travel only, but the public may construct drains, sewers, gutters, gas-pipes, cisterns, etc.; and, in case of a dedication of the street, such uses are contemplated. The city corporation may make every use of a street which reasonably conduces to the public convenience and enjoyment. The use of streets for the purpose of laying down water-pipes stands upon the same principle as their use for sewers and gas-pipes. As cities of the second class in this state have power to supply the inhabitants with water, the authorities thereof may use, or, as an incidental power, may permit the contractor or other parties to use, the streets for this purpose. Comp. Laws 1879, §§ 31, 32, 36, 54, 61, 68, c. 19; 2 Dill. Mun. Cor. (3d Ed.) §§ 688-697; *Commissioners v. Hud-*

son, 13 N. J. Eq. 420; *City of Cincinnati v. Penny*, 21 Ohio St. 499; *West v. Bancroft*, 32 Vt. 367; *Kelsey v. King*, 32 Barb. 410; *Warren v. Grand Haven*, 30 Mich. 24.

After the plaintiff laid out and platted his town lots, and then acknowledged, certified, filed and had recorded the map thereof in the office of the register of Wyandotte county, the fee of the streets and alleys vested in the county of Wyandotte, yet the control of such property is almost entirely and absolutely in the city of Kansas. The rights given by this dedication are not taken away by the attempted reservation written upon the map or plat, because such reservation must be deemed inoperative and void as against the public. It is not in accordance with the terms of the statute vesting the fee of the property dedicated for public use in the county, and to recognize such a doctrine would be not only to violate the statute, but would take from the direction and control of the public authorities the use of the streets for many necessary and important purposes for which streets are usually devoted to satisfy the wants and conveniences of the people. *City of Des Moines v. Hall*, *supra*.

We conclude that the defendant had the right, under the license granted it, to enter upon the streets in controversy and make excavations therein beneath the surface of the streets so as to lay its water-mains through which to conduct water to supply the inhabitants of Kansas City.

The order and judgment of the district court must be affirmed.
(All the justices concurring.)

(33 Kan. 619)

WEAVER and another v. HALL.

MARTIN and others v. HALL.

Filed June 4, 1885.

APPEAL—DEFECTIVE TRANSCRIPT—DISMISSAL.

Where a case is brought to the supreme court, not upon a case made for the supreme court, but upon a transcript of only a portion of the proceedings of the trial court, and no portion of the pleadings is brought to the supreme court, nor any statement as to what the pleadings or the issues were, and the transcript is otherwise so defective that the supreme court cannot determine the case upon its merits, *held*, that the case will be dismissed.

Error from Elk county.

L. Scott, for plaintiffs in error.

R. H. Nichols, *A. M. Bowen*, and *S. B. Oberlander*, for defendant in error.

VALENTINE, J. An objection is made to a hearing of this case upon its merits, for the reason that the case has not been properly brought to this court; and from an inspection of the record brought to this court such objection would seem to be good. The record upon which the case has been brought to this court does not purport to be a case made, nor a transcript of the full proceedings of the court below, but

only a transcript of a portion of such proceedings. It does not contain the pleadings in the case, nor any statement as to what the pleadings or the issues were. It does not contain the evidence in the case, nor any statement as to what the evidence was. It shows that the case was tried before the court, without a jury, but it does not show what the issues were which were thus tried. It shows that the court made certain findings of fact and conclusions of law, but it does not show that either party desired the court to do so, nor does it show whether these findings responded to the issues or not. With such a record before us we do not think that it would be our duty to attempt to decide the case upon its merits. It must be remembered that this is not a case made for the supreme court, where both parties saw the case before it was settled; where one party made it and the other party was given ample opportunity to make suggestions or amendments thereto, and where the case was afterwards settled and signed by the presiding judge, with an opportunity to both parties to be present: but it is simply a transcript of a portion of the proceedings of the court below, and of such portion only as the plaintiffs in error have chosen to bring to this court. While this court will be inclined to look favorably upon all condensations and abridgements in cases specially made for the supreme court, and settled and signed by the trial judge, we think we should not look favorably upon transcripts of only a portion of the proceedings, selected solely by the party bringing the case to this court; and, entertaining these opinions, as we do, we think this case should be dismissed from this court; and it is accordingly so ordered.

The case of *Martin v. Hall* is in precisely the same condition as the case of *Weaver v. Hall*, and therefore the same order will be made in both cases.

(All the justices concurring.)

(33 Kan. 598)

HAFEY v. BRONSON.

Filed June 4, 1885.

TAX DEED—NOTICE OF SALE—"PUBLIC AUCTION."

Where a county treasurer gives notice of a tax sale, but does not state in his notice that the property will be sold "at public auction," as the statute requires, but omits the words "at public auction," held, that such omission will not render the tax sale, or the tax deed founded thereon, absolutely void, but will render the same voidable, at the instance of the original owner of the property, at any time within five years after the tax deed has been executed and recorded.

Error from Greenwood county.

Clogston & Fuller, for plaintiff in error.

Almerin Gillett and Ira P. Nye, for defendant in error.

VALENTINE, J. This was an action in the nature of ejectment, brought by H. G. Bronson, on September 28, 1883, in the district court of Greenwood county, against C. J. Hafey, for the recovery of

certain real estate. The case was tried by the court, without a jury, upon the following agreed facts and evidence:

"At the May (1884) term of said court said cause came duly on for trial, and thereupon the following was admitted and agreed to by said parties: That the plaintiff is the legal owner of the land described in his said petition, save and except the title claimed by the defendant, under and by virtue of a tax deed heretofore issued by Greenwood county to George O. Lovett, defendant claiming under said Lovett.

"It is further agreed that if said tax deed conveyed title, that defendant is entitled to recover, otherwise judgment should be for the plaintiff; and it is further admitted that defendant is in actual possession of said premises by virtue of said deed. It is further admitted that said land was subject to taxation, was duly assessed, and was properly placed upon the tax-rolls, and the taxes unpaid, and that said land was subject to sale for said unpaid taxes; that said land, for said delinquent taxes, was sold; that afterwards, upon said sale, a tax deed, under which defendant claims, was issued by said county; and that said tax deed was regular upon its face.

"To attack said deed plaintiff offered in evidence the following notice, under which said land was sold, and upon which said sale said deed was issued; said notice being in words and figures as follows, to-wit:

"COUNTY TREASURER'S NOTICE.

"*State of Kansas, Greenwood county—ss.:*

"EUREKA, KANSAS, July 30, 1879.

"Notice is hereby given that I will offer for sale at my office in Eureka, Greenwood county, Kansas, on the first Tuesday in September, A. D. 1879, and next succeeding days, so much of each tract of land described below as is necessary to pay the taxes and charges thereon for the year 1878.

"W. H. DAUM, County Treas.

"Plaintiff rests.

"Thereupon plaintiff admitted that said land was actually sold, under said notice, at the time and place mentioned in said notice, and at public auction.

"The above and foregoing is all the testimony offered and admissions made in said cause."

Upon these agreed facts and evidence the court below found in favor of the plaintiff and against the defendant, and rendered judgment accordingly, giving the possession of the property to the plaintiff, upon his payment to the defendant of the sum of \$214.11, the amount of the taxes, penalties, costs, and interest due on the land and paid by the defendant. The defendant, as plaintiff in error, now brings the case to this court.

It appears that the only irregularity in the tax proceedings was that the county treasurer did not state, in his notice of the tax sale, that the property would be sold "at public auction," as is required by the statute. Comp. Laws 1879, c. 107, § 106. In other words, he omitted the words "at public auction" in his tax-sale notice. It has already been decided by this court that the omission of such words from the tax-sale notice will not, of itself, and where everything else has been regular, render the tax sale absolutely void, but, at most, only voidable. *Belz v. Bird*, 31 Kan. 139; S. C. 1 PAC. REP. 246. And the question now arises, will such omission render the tax sale, and the tax deed

founded thereon, voidable? We are inclined to think it will; not because it might mislead the owner of the property, but because it might mislead others, and persons who might desire to attend the tax sale, and purchase the lands offered for sale, provided they were offered "at public auction." The statute seems to make these words material, because, in express terms, it requires that they shall be placed in the tax-sale notice; and we do not think that it would be proper for us to hold that they are immaterial or unnecessary; but to hold, as we do, that these words are necessary, and that, where the sale has been made upon a tax-sale notice, in which these words have been omitted, the tax sale and the tax deed are voidable, but not void, will not result in any harm or hardship to any person. Considering such to be the law, the original owner of the land must either pay his taxes or lose his land; but he will not lose his land until after he has had ample time within which to redeem the same from the taxes. If this is the law, then the only effect of the aforesaid omission will be to extend the original owner's right to redeem his land from the taxes for the period of five years after the tax deed is executed and recorded. This, under the circumstances, would seem to be equitable as to all the parties. After such an omission from the tax-sale notice,—an omission in direct violation of the express terms of the statute,—it would seem that the title to the property should not irrevocably pass from the original owner to the tax-deed holder, until the original owner had ample time within which to redeem his land from the taxes, and the five-years statute of limitations would evidently furnish and be the proper measure of such ample time.

The judgment of the court below will be affirmed.

(All the justices concurring.)

(33 Kan. 582)

FULLER v. FULLER.

Filed June 4, 1885.

1. MARRIAGE—ACTION TO ANNUL.

Where a man innocently marries a woman who has a husband living, he may afterwards maintain an action against her in equity, and independent of the statutes relating to divorce and alimony, to have the supposed and colorable marriage declared to be a nullity.

2. SAME—CLAIM OF ALIMONY.

And in such an action the defendant is not entitled to recover permanent alimony.

3. SAME—ALIMONY REFUSED.

And although she may in her answer, by way of cross-petition or cross-bill, set up new matters and ask for a divorce and alimony, but also shows in her answer that she is not entitled to either a divorce or alimony, she cannot recover permanent alimony upon a judgment rendered in the case declaring the marriage between herself and the plaintiff to be a nullity.

Error from Butler county.

T. L. Jones and *H. W. Schumacher*, for plaintiff in error.

T. O. Shinn, for defendant in error.

v.7p,no.4—16

VALENTINE, J. This action was brought on July 18, 1884, in the district court of Butler county, by A. H. Fuller against Mary A. Fuller, for a divorce, and to have a marriage, supposed to have been consummated between them, set aside and held for naught, upon two grounds—*First*, that the defendant had a former husband living at the time of her marriage with the plaintiff; *second*, extreme cruelty on the part of the defendant towards the plaintiff. The defendant answered, setting up: *First*, a general denial, except as to allegations specifically admitted in her answer; *second*, admissions on her part of the supposed marriage to the plaintiff, as alleged by him, and also that at the time of said supposed marriage she was the lawful wife of another; but alleged that at that time she believed that she had been divorced, and that her former husband was dead, and stated reasons therefor. The defendant also, by way of cross-petition or cross-bill, alleged good faith and good conduct on her part, and that by their mutual toil and industry, while living together, they had accumulated property to the amount of about \$2,300, and that the plaintiff was, at the commencement of this action, worth about \$3,500; and also alleged that the plaintiff had in various ways misconducted himself towards her, and then prayed for a divorce from him, and that he be required to pay her \$1,000 alimony, and \$200 attorney's fees. The plaintiff replied by setting up a general denial, except as to matters expressly admitted; alleging that while they lived together he received a pension of about \$1,200, and that by investments thereof he had accumulated about the amount which the defendant claimed they had jointly accumulated, and that he was then worth about \$3,000; and he also alleged further misconduct on the part of the defendant.

The case was tried September 22, 1884, by the court without a jury. But before proceeding with the trial the plaintiff, with leave of the court, struck out all that portion of the prayer of his petition which asked for a divorce, and afterwards prosecuted his action merely for the purpose of having the supposed marriage between himself and the defendant declared to be a nullity. The plaintiff did not introduce any evidence tending to prove extreme cruelty on the part of the defendant, but introduced evidence merely tending to show the former marriage of the defendant, and that she had not been divorced, and that her former husband was still living. The defendant did not introduce any evidence, but offered to introduce evidence tending to show that from \$1,600 to \$1,800 in value of the wealth of the plaintiff was the product of the united labors of the plaintiff and the defendant while they were living together, and offered to introduce evidence tending to show that at the time of her marriage with the plaintiff he had full knowledge concerning her former marriage and her separation from her former husband, and also evidence tending to show that at the time of her marriage with the plaintiff she believed that she was not a married woman; but the plaintiff objected, and the

court excluded the evidence, and both parties then closed their evidence. The court then made the following special findings, to-wit:

"SPECIAL FINDINGS.

"Upon the request of the plaintiff the court makes in this case the following special findings of fact from the testimony introduced: (1) That on the eleventh day of September, A. D. 1881, the plaintiff, A. H. Fuller, and the defendant, Mary A. Fuller, did enter into the bonds of matrimony and did contract marriage in fact. (2) That on the twenty-seventh day of May, A. D. 1876, in the city of Joplin, Jasper county, Missouri, the said defendant was legally married to one James R. McKee, who is still living. (3) That at the date of said marriage in fact between said plaintiff and defendant, the said defendant was then the lawful wife of said James R. McKee. (4) The said defendant was married to the plaintiff under the name of Mary A. Walker. (5) That said plaintiff was, at the time of commencing this suit, worth about three thousand dollars, (\$3,000). (6) That plaintiff is the equitable owner of lots 3, 4, and 5, block L, of Herman & McKittrick's addition to the city of Augusta, Kansas, which are worth about six hundred dollars, (\$600,) and which is the homestead of the plaintiff "

Upon these findings the court below rendered judgment "that the marriage of the said plaintiff to said defendant be, and the same is hereby, declared and decreed null and void; that the plaintiff pay to said defendant the sum of six hundred dollars as alimony, and that the same be a lien on the homestead of said plaintiff, and in default of the payment thereof for the space of thirty days, that an order of sale issue for the sale of said homestead;" giving a proper description thereof. The plaintiff, as plaintiff in error, now brings the case to this court, and complains especially of that portion of the judgment of the court below which awards to the defendant \$600 as alimony. We think the judgment to this extent is erroneous. That a marriage, where one of the parties at the time has a husband or wife living, is void, absolutely and in all its aspects, we suppose no one will question. It requires no judgment of divorce or of nullity to render it void. It is void inherently, and from the beginning. Under our statutes, however, for prudential reasons the innocent party is allowed, if he or she chooses, and by an ordinary action for divorce, to have the supposed or colorable marriage set aside and annulled. Also, the innocent party may maintain an action in equity to have such colorable marriage declared null and void. This equitable remedy is the kind of action which the plaintiff in this case is now seeking to maintain, and which he has sought to maintain ever since he amended his petition in the court below by striking out all that portion of the prayer of his petition which related to divorce.

If the plaintiff may maintain this action, then the defendant cannot recover permanent alimony, for the following reasons: the action is not prosecuted under the statute authorizing alimony, and as the defendant, in legal contemplation, has never been the wife of the plaintiff, she is not entitled to alimony independent of the statute. The defendant, however, claims that she filed an answer by way of

cross-bill, asking for a divorce and alimony, and therefore that under her answer and by virtue of the statute she should recover alimony. In answer to this, it may be said that her answer or cross-petition does not state any cause of action for either divorce or alimony. It admitted that she was not the wife of the plaintiff, and never had been, and because of her own incapacity and fault. And while it alleges some misconduct on the part of the plaintiff, it does not allege any such misconduct as would entitle her to a divorce or alimony even if she had been his wife, which she was not; and therefore, under no view that can be taken of the case, can she recover alimony.

We have examined all the authorities cited by counsel for the defendant, and we do not think that any of them conflicts with these views. We have also examined several other cases, and we think that this decision is in entire harmony with all of them. It is certainly in harmony with the case of *Powell v. Powell*, 18 Kan. 371, 380, 381. It is our opinion, however, that in all judicial separations of persons who have lived together as husband and wife, a fair and equitable division of their property should be had; and the court in making such division should inquire into the amount that each party originally owned, the amount each party received while they were living together, and the amount of their joint accumulations. Of course, these matters are not conclusively controlling. For instance, where a real marriage has taken place and alimony is granted to the wife because of the husband's fault, such alimony may be granted out of his estate, although the wife may never have owned any property, and never contributed anything to her husband's wealth. Alimony, however, is never awarded to a woman who is not a wife, where she alone is at fault, and out of an estate to which she has contributed nothing.

We think the court below erred as against the plaintiff in granting alimony to the defendant. Whether the court did not also err as against the defendant in not hearing her testimony with regard to joint accumulations of property by her and the plaintiff while they were living together, is not before us. The defendant has not filed any petition in error, or cross-petition in error, in this court, nor is she seeking any reversal or modification of the judgment of the court below. We might here say that there was no evidence nor any admission in the court below showing that there were any joint accumulations of property, or that the defendant ever contributed anything towards the plaintiff's wealth.

The judgment of the court below will be modified in accordance with this opinion.

(All the justices concurring.)

(33 Kan. 572)

BUSENBARK and others v. BUSENBARK.

Filed June 4, 1885.

1. HUSBAND AND WIFE—ALIENATION OF WIFE'S INTEREST IN HUSBAND'S REAL ESTATE.

While the wife's right and interest in the real estate of her husband not occupied by the family as a homestead is inchoate and uncertain, yet it possesses the element of property to such a degree that she may maintain an action during the life of her husband to prevent its wrongful alienation or disposition under fraudulent judgments procured and consented to by the husband with the object and for the purpose of defeating the wife's right.

2. SAME—INJUNCTION.

An action may be maintained to perpetually enjoin the enforcement of a judgment procured through fraud of the parties for the purpose of defrauding a third person, and such third person may maintain such action in any county in which the attempt is made to put the fraudulent judgment in force to his injury, although the judgment may have been rendered in another county.

3. DIVORCE—COSTS.

Where a wife commences an action against her husband for divorce, and in answer thereto the husband also files his cross-petition for a divorce, which cross-petition for divorce he withdraws by leave of the court, after the evidence in the case is closed, the trial court commits no error in requiring the husband to pay all reasonable expenses of the wife in the defense of such cross-petition, including her attorney's fees.

4. SAME—PROVISION FOR WIFE WHEN DIVORCE REFUSED.

Where a wife commences an action against her husband for a divorce, and upon the trial it appears that the parties are in equal wrong, and the court refuses to grant a divorce, the court may, for good cause shown, make an order for the control and disposition of the property of the parties as may be proper; and in disposing of the property may set apart to the wife, absolutely, personal property, and also give her the rents and profits of real estate. Section 643, Code.

Error from Sedgwick county.

Action commenced by Augusta Busenbark against Henry Busenbark, John A. Busenbark, Josephine Underwood, and H. R. Watt, November 26, 1883, to obtain a divorce from her husband, Henry Busenbark, on the grounds of extreme cruelty and gross neglect of duty; and the petition alleged, among other things, that her husband, for the purpose and with the intent of defrauding her of all interest in his estate, and to defeat any judgment for alimony, entered into collusion with his son, John A. Busenbark, and his daughter, Josephine Underwood, whereby the son and daughter each obtained a personal judgment against him, in the district court of Harvey county, in this state, on September 26, 1883, for the sum of \$7,912; that executions had been issued on the judgments, levies made on all his real estate except his homestead, and that the same were advertised for sale. She further alleged in her petition that each of the judgments was fraudulent, and in fraud of her rights, and that it was the intention of her husband to so dispose of and cover up his property as to place the same beyond her reach, and then desert her, leaving her without proper means of support. She prayed for a divorce, and that the said judgments be declared fraudulent, and that she have temporary and permanent support; and that an injunction

issue and be made perpetual upon the final hearing. Henry Busenbark filed his separate answer, with a cross-petition for divorce. He denied each allegation of extreme cruelty and gross neglect of duty; denied the collusion charged, the intention of abandonment, and the intention of leaving her without support; admitted that the judgments were obtained, but denied they were fraudulent and void. He alleged that he had, several years prior to the time that the judgments were obtained, given said son and daughter each a quarter section of land, being the same land levied upon, as an advancement to them, and that each had been in possession of the land for several years, and made valuable and lasting improvements. John A. Busenbark and Josephine Underwood each filed their separate answer. They denied any collusion with their father to defraud the plaintiff. They alleged that the lands levied upon belonged to them, having been given them by their father as their portion and advancement; that they had been put in possession thereof; that they had made valuable and lasting improvements on the land; that, while the notes upon which the judgments were obtained were given for no valuable consideration, there was a consideration by way of natural love and affection; that as the plaintiff had refused to sign with their father the deeds of the land to them, they sought through the judgments, and the intended sale thereunder, to obtain the legal title to the premises levied upon.

Trial had at the June term for 1884. After the evidence had closed, Henry Busenbark withdrew, by leave of the court, his cross-petition. The court made the following conclusions of fact:

"That on the twenty-sixth day of September, 1883, in a certain action pending in the district court of Harvey county, Kansas, wherein the said John A. Busenbark was plaintiff and the said Henry Busenbark was defendant, the said John A. Busenbark recovered a judgment against said Henry Busenbark for the sum of \$7,912, with interest thereon at the rate of twelve per cent. per annum; that on the twenty-sixth day of September, 1883, in a certain action pending in the district court of Harvey county, Kansas, wherein the said Josephine Underwood was plaintiff and said Henry Busenbark was defendant, the said Josephine Underwood recovered a judgment against said Henry Busenbark for the sum of \$7,912, with interest thereon at the rate of twelve per cent. per annum; that on the twenty-third day of October, 1883, the said John A. Busenbark and Josephine Underwood caused executions to be issued out of the office of the district court of said county of Harvey for the collection of said judgments; that said executions were directed to the sheriff of Sedgwick county, Kansas, and were received by him on the twenty-fifth day of October, 1883; that on the — day of —, A. D. 1883, H. R. Watt, said sheriff, caused said execution for the collection of said judgment in favor of said John A. Busenbark to be levied upon the following described premises in Sedgwick county, Kansas: the south-west quarter of section 12, township 25, range 1 east; also north-west quarter of south-west quarter 23, township 25, range 1 west; that on the — day of —, A. D. 1883, H. R. Watt, said sheriff, caused said execution for the collection of said judgment in favor of Josephine Underwood to be levied on the following described premises in Sedgwick county, Kansas, to-wit: the north-east quarter of section 13, township 25, range 1; also north-east quarter of south-west

quarter of section 23, township 25, range 1 west; that on the second day of November, 1883, the said H. R. Watt, sheriff as aforesaid, caused said premises to be advertised for sale under said levies aforesaid; that said judgments so rendered in the district court of Harvey county, Kansas, as aforesaid, are fraudulent and void; that the attempted sale of said premises under said execution was for the purpose of vesting the title to said real estate in the said John A. Busenbark and Josephine Underwood in fraud of the rights of said plaintiff; that no grounds of divorce exists in favor of the plaintiff herein; that the plaintiff has no property, real or personal, in her own name and right.

"That at the commencement of this action the defendant was the owner of the following real property, to-wit: The north-east quarter of section 13; township 25, range 1 east, and north-east quarter of south-west quarter of section 23, township 25, range 1 west; the south-west quarter of section 12, township 25, range 1 east, and north-west quarter of south-west quarter of section 23, township 25, range 1 west; also the east half of north-west quarter of section 18, township 25, range 2 east, all in Sedgwick county, Kansas, and personal property of large value. That for a long time prior to the commencement of this action the defendant Henry Busenbark, in collusion with defendants John A. Busenbark and Josephine Underwood, were, and ever since have been, fraudulently attempting to cover up and dispose of all aforesaid property for the purpose of defeating the said plaintiff in any right or interest which she might have in or to said property, depriving her of her means of support and of the abandonment of said plaintiff by said Henry Busenbark, and that said judgments were rendered and said executions were issued in pursuance of said fraudulent attempt."

Thereon the court made the following conclusions of law:

"That the said judgments, rendered as aforesaid, in the district court of Harvey county, Kansas, in favor of said John A. Busenbark and Josephine Underwood, be, and they are hereby, declared to be fraudulent and void. That said executions and levies constitute no lien on said premises. That said Henry Busenbark, John A. Busenbark, and Josephine Underwood be, and they are hereby, enjoined and restrained from collecting or attempting to collect said judgments, or from selling or attempting to sell said premises, or any part thereof, or from mortgaging or in any way incumbering said property, or any part thereof, without the assent of said plaintiff, Augusta Busenbark. That said plaintiff have the right, conjointly with said defendant Henry Busenbark, to the possession and occupancy of the following premises heretofore occupied as a homestead by the plaintiff and defendant, to-wit: The east half of north-west quarter of section 18, township 25, range 2 east, in Sedgwick county, Kansas. That plaintiff have the issues, rents, and profits of the following described premises, and that she have the right to rent and control the same: the south-west quarter of section 12, township 25, range 1 east, in Sedgwick county, Kansas.

"That the defendant Henry Busenbark return to the plaintiff, and that she have as her separate and absolute property all the household goods in the house of said homestead, or belonging thereto; one horse named 'Sam,' heretofore kept on said homestead; two cows, one stirring plow, and cultivator. That said defendants, Henry Busenbark, John A. Busenbark, and Josephine Underwood, be and they are hereby enjoined and restrained from in any way interfering with said plaintiff in the peaceable possession of the said homestead premises, to-wit, the east half of section 18, township 25, range 2 east, Sedgwick county, Kansas, or in the renting, controlling, or receiving the issues, rents, and profits of the said south-west quarter of section 12, township 25, range 1 east, of said county of Sedgwick. That plaintiff have and recover of and from defendant Henry Busenbark the sum of \$50 dollars as her rea-

sonable attorney's fees herein; and that defendant Henry Busenbark pay the costs of this action, taxed at eighty-seven and fifty one-hundredths dollars, (\$87.50.)"

The defendants filed their motion for a new trial, which was overruled. They excepted, and bring the case here.

J. W. Ady and Ruggles & Parsons, for plaintiffs in error.

Stanley & Wall, for defendant in error.

HORTON, C. J. It is claimed that the district court of Sedgwick county had no power or jurisdiction to enjoin the judgments rendered by the district court of Harvey county on September 26, 1883, in favor of John A. Busenbark and Josephine Underwood against Henry Busenbark; and further, that the court erred in finding these judgments to be fraudulent and void. A wife residing in this state is entitled, upon the death of her husband, to the half of all the real estate owned by him during the marriage, which has not been sold on judicial sale, and is not necessary for the payment of debts, and of which the wife has made no conveyance, so that there is an inchoate interest to the extent of one-half given to the wife in the real estate of the husband. It is true that this interest in the real estate of the husband is inchoate and uncertain, yet, according to the authorities, it possesses the element of property. It is an interest and right of which she can be divested only by her consent, or crime, or her dying before her husband. It is an interest which may be, in connection with the husband, the subject of contract and bargain, and is, by many of the authorities, denominated a contingent but valuable interest. It has been decided by this court that the wife has an estate in the homestead occupied by herself and husband, although the title to the same be in the husband, and that it is such a present and existing estate that it will be protected by the courts. *Helm v. Helm*, 11 Kan. 19; *Jenness v. Cutler*, 12 Kan. 500. We now go further, and declare that although the wife's right and interest in the real estate of her husband not occupied as a homestead is inchoate and uncertain, yet it possesses the element of property to such a degree that she may maintain an action during the life of her husband for its protection, and for relief from fraudulent alienation by her husband. *Buzick v. Buzick*, 44 Iowa, 259; *Thayer v. Thayer*, 39 Amer. Dec. 211-220, and the note and authorities there cited.

Now it is well settled that fraud invalidates judgments, as well as contracts or other acts, and that a court of equity has power to grant relief against judgments fraudulently obtained. Whenever a judgment is procured through fraud of the parties thereto, for the purpose of defrauding a third person, such third person may escape from the injury thus attempted by establishing the fraud or collusion by which the judgment was obtained, in a separate and independent suit. *Freem. Judgm.* § 336. The fraudulent judgment in this case was rendered in Harvey county, but executions were issued to the sheriff of Sedgwick county, and the premises of the husband in Sedgwick

county were levied upon and were about to be sold in pursuance of a fraudulent scheme concocted between the husband and his children, with the object and for the purpose of defeating the wife's rights. When the parties to the fraudulent judgment sought to enforce it in Sedgwick county, it was competent for the wife to relieve herself from the injury thus attempted, by her action in Sedgwick county to prohibit the sale of the real estate. *Chambers v. King Wrought-iron Bridge Manufactory*, 16 Kan. 270.

The cases of *Meixell v. Kirkpatrick*, 28 Kan. 315, and *Galbreath v. Drought*, 29 Kan. 711, are confidently cited to support the proposition that the district court of Sedgwick county had no jurisdiction over the judgment in Harvey county, or power to enjoin the executions issued from the district court of Harvey county on the judgment rendered therein. Those cases are bottomed upon irregular and erroneous judgments, not upon fraudulent and void judgments, and therefore are not applicable. It was said in *Meixell v. Kirkpatrick*, *supra*, that "a void judgment may be treated as void everywhere, and collaterally as well as directly, while a judgment that is merely irregular, or erroneous, or voidable, cannot be so treated." It was also said in *Klemp v. Winter*, 23 Kan. 699, that "fraud vitiates everything it touches,—final judgments, final orders, final settlements and contracts, as well as things of less consequence,—and that courts possessing general equity or chancery jurisdiction have the power to grant proper relief in all cases of fraud." Upon the record, we perceive no error in the finding and the conclusion of the trial court that the judgments of the district court, rendered against Henry Busenbark in favor of his children, were fraudulent and void.

It is next claimed that the judgment giving the wife certain personal property, and also the rents and profits of a quarter section of land, was improper. The statute controls. This provides:

"When the parties appear to be in equal wrong, the court may, in its discretion, refuse to grant a divorce; but in any such case, or in any other case where a divorce is refused, the court may, for good cause shown, make such order as may be proper for the custody, maintenance, and education of the children, or the control and disposition of the property of the parties, as may be proper." Section 643, Code.

Its provisions are broad enough to sustain the court in its judgment relating to the disposition of the property of the parties. Its constitutionality is not challenged. The husband and wife had been married about 15 years. The wife was a very industrious and hard-working woman; she had not only performed the customary household work, but had also assisted her husband at his labors upon the farm and in his business, upon various occasions and in various ways; she herded cattle, spaded ground, butchered hogs and cattle, etc. Her labors must have aided him in accumulating property, and before he commenced disposing of his personal and real estate he was in good circumstances, having, besides his personal property,

over 500 acres of valuable land. The evidence shows that Henry Busenbark gave as the reason for marrying his wife "that she was a German, and he thought they could do more work than any other class of people." Prior to the trouble that grew up between them on account of the refusal of the wife to join in conveying the real estate to her husband's children, the husband had no complaint to make that his wife did not do all the work he expected of her when he married her. He had cause, perhaps, to complain of her tongue, but not of the work of her hands. If the power existed in the trial court to make any disposition of any part of the property of the husband for the benefit of the wife, the order of the court was just and reasonable.

It is also claimed that the trial court erred in requiring the husband to pay \$50 attorney's fees. Section 644, among other things, provides: "On granting a divorce in favor of the wife, or refusing one on the application of the husband, the court may require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action." The husband filed a cross-petition for a divorce. It is true that he withdrew this by leave of the court after the evidence had closed, but the expense to the wife in resisting this application for divorce had already accrued at the time of the withdrawal of such petition. We suppose it was withdrawn in anticipation that the court would refuse the application of the husband for a divorce. Within the spirit of the law, if not within its exact letter, the court committed no error in requiring the husband to pay all reasonable expenses, including attorney's fees, of the wife in defending against such cross-petition.

Other alleged errors are referred to in the arguments, but believing that the findings of the court are sufficiently sustained by the evidence, and that none of the said alleged errors were prejudicial to the rights of the parties complaining, the judgment of the district court must be affirmed.

(All the justices concurring.)

SUPREME COURT OF UTAH.

(4 Utah, 215)

BOWERS v. UNION PAC. R. CO.

January Term, 1885.

1. MASTER AND SERVANT—DEFECTIVE MACHINERY—KNOWLEDGE OF SUPERINTENDENT.

Knowledge of the superintendent of a mine as to a defect in the machinery used will render the company for whom he acts responsible for an injury caused thereby.

2. SAME—DUTY OF EMPLOYER.

It is the duty of an employer to exercise reasonable and ordinary diligence to furnish sound material and machinery, and not to use such as are unsound or imperfect, after the defects have been brought to his knowledge. An employe has a right to presume that the employer has used such diligence.

3. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Where the facts proved by a plaintiff do not upon their face show negligence in the plaintiff, the defendant, if he relies on contributory negligence, must prove it.

4. SAME—NONSUIT.

The court, in an action for personal injury to an employe caused by negligence of his employer, will not be warranted in sustaining a motion for nonsuit unless the misconduct of the respondent appears so clearly that it could see that a verdict in his favor would necessarily have to be set aside. Motion *held* properly overruled.

5. SAME—INSTRUCTIONS.

Instructions examined, and *held* proper.

6. SAME—NEW TRIAL—EXCESSIVE DAMAGES.

A verdict of \$10,000 *held* not excessive.

Arthur Brown, for respondent.

Williams & Young, for appellant.

BOREMAN, J. The respondent, who was plaintiff below, brought an action in the First district court against the appellant for personal injuries received in a coal mine owned and worked by the appellant. The injuries consisted of the cutting and maiming of the respondent's right foot by coal cars, necessitating amputation. The damages were laid at \$50,000. Answer having been filed denying the allegations of the complaint, a trial was had before a jury, resulting in a verdict and judgment in favor of the respondent for \$10,000 damages. At the close of the evidence for the respondent, the appellant had made its motion for a nonsuit, which was by the court overruled. After verdict and judgment the appellant moved for a new trial, which was also overruled. Thereupon the case was brought to this court by appeal from the judgment, and from the order overruling the motion for a new trial.

1. The principal ground urged by the appellant for a reversal of the order and judgment of the court below, is the alleged insufficiency of the evidence to justify the verdict.

(a) Under this head it is claimed that the evidence failed to show that the accident resulted from the fault or negligence of the appel-

lant. It appears, and did so appear when the motion for a nonsuit was made, that the accident was caused by the breaking of the car-couplings and consequent falling of the cars upon the respondent's foot; that the couplings (the links and draw-bar) broke because of the defective or imperfect character of the iron of which they were made; and that the company (the appellant) had knowledge of the imperfection of the iron. The attention of the superintendent was called to it. He had charge of all the materials and works at the mine, and under him all employes labored. To the workmen he was the mouth-piece, the representative, of the company. *Beeson v. Green Mountain G. M. Co.* 57 Cal. 20; *Chicago, M. & St. P. Ry. Co. v. Ross*, 112 U. S. 377; S. C. 5 Sup. Ct. Rep. 184. The position of the appellant is, therefore, untenable on this point; as the evidence did not fail to show that the accident resulted from the fault or negligence of the appellant.

(b) The second reason offered to show the insufficiency of the evidence, namely, that the respondent, when the accident occurred, knew, or had the means of knowing, and ought to have known, of the defects in the couplings, seems likewise untenable. The respondent, as a witness, says that he knew nothing of the imperfect character of the couplings, and no such knowledge is brought home to him by any other evidence; nor does anything appear to indicate that in the nature of things he ought to have known of it. The law makes it incumbent upon a workman to know whatever is embraced within his special line of employment; but it is not required of him that he should know those things which belong wholly to another and different branch of service. If it had come within his line of duty in his occupation to have examined into the structure and nature of the couplings, and of the iron composing them, there might be some reason for holding him responsible for not knowing of the defects therein. But his duties were far different, and did not require or authorize him to have anything whatever to do with the couplings. He was employed as track-fixer, and to assist in placing upon the track the cars which should get off at the curve in the road-way. *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183; *Noyes v. Smith*, 28 Vt. 59.

Beyond this, when the respondent entered into the service of the company, he took upon himself the natural and ordinary risks and perils incident to the performance of his services, but he never engaged to risk the perils of imperfect material and burnt iron, knowingly used by the company. It was the duty of the company to exercise reasonable and ordinary diligence to furnish sound material and machinery, and not to use such as were unsound and imperfect, after the defects had been brought to its knowledge. The respondent had the right to presume that the company had used such diligence. *Beeson v. Green Mountain G. M. Co.* 57 Cal. 20. This being a case where defective material caused the injury, the rule which exempts the master from liability for an injury to a servant, caused by the negli-

gence of a fellow-servant, does not apply. The negligence is that of the company, and not of a fellow-servant. *Trask v. California S. R. Co.* 63 Cal. 96; *Hough v. Railway Co.* 100 U. S. 213.

(c) It is urged that the evidence shows negligence in the respondent himself, and that his negligence contributed to produce the injury. It is a well-settled rule that in such a case as the one before us, if the party seeking relief was negligent, and such negligence amounted to an absence of ordinary care, and directly, immediately, or proximately contributed to the injury, relief would be denied. *Strong v. Sacramento & P. R. Co.* 61 Cal. 326. But, according to this rule, nothing that the respondent did at the time of the accident, so far as appears by the evidence, would relieve the appellant of its responsibility. The respondent had been called from his work as track-fixer to go to the other (the west) side of the track and help to replace a car upon the track. After this was done, his other duties required him to recross the track to the east side. The facts, so far as they appear, tend to show that he was taking a step in the direction of the east side. Whether he had started across too soon, or not soon enough, or at all, does not appear. His duties had called him to the place where he was hurt. If he was negligent in staying or getting away from that point, the burden of showing it devolved upon the appellant. Where the facts proved by a plaintiff do not, upon their face, show negligence in the plaintiffs, the opposite party, if he relies upon the fact of negligence, must show it. *Robinson v. Western Pac. R. Co.* 48 Cal. 409, (426); *McQuilken v. Central, P. R. Co.* 50 Cal. 7; *McDougall v. Central R. Co.* 63 Cal. 431. But this is not a question for the court. Whether the defendant was negligent or not, and whether his negligence, if any existed, directly or proximately contributed to the injury, were questions for the jury under instructions of the court; and such matters cannot be taken from the jury unless the facts are clearly settled, and the course which common prudence would dictate can readily be discerned. Negligence is generally a mixed question of law and fact; and sometimes, although all the facts are admitted, the question arises whether the act imputed as negligence was such as persons of ordinary prudence would have performed under the circumstances; and, unless the question is clear of all doubt, it is the duty of the court to leave it with the jury, and not to disturb their finding. *Fernandes v. Sacramento City Ry. Co.* 52 Cal. 45; *Jamison v. San Jose & S. C. R. Co.* 55 Cal. 593; *Nehrbas v. Central P. R. Co.* 62 Cal. 320; *Davis v. Utah Southern R. Co.* 3 Utah, 218; S. C. 2 PAC. REP. 521.

In the case under consideration, if the facts were all admitted, the question of negligence would probably have to be settled by inference from them; and in that event the jury and not the court should pass upon it. The court could take the question from the jury only in case the course which common prudence would dictate be plain and clear. *Chidester v. Consolidated Ditch Co.* 59 Cal. 197; *McKeever v. Market*

St. R. Co. 59 Cal. 294, (300.) But, further, if the question were a proper one for the court, and the evidence for the respondent, instead of greatly preponderating, were only sufficient to enable the court to find that there was a substantial conflict of evidence, the verdict and judgment could not be set aside. 2 Utah, 126; *People v. Biddlecome*, 3 Utah, 213; S. C. 2 PAC. REP. 194; *McKeever v. Market St. R. Co.* 59 Cal. 294.

2. It is alleged that the damages were excessive. The respondent is a young man, only 24 years of age at the time of the accident. The injury has unfitted him for pursuing his calling. If the amount of the verdict, \$10,000, were loaned out, it would bring at legal interest about the sum which he would have been able to have earned at his usual vocation had the accident not occurred. Taking these facts into consideration, together with the great physical suffering produced by the injury, we are led to believe that the damages were not excessive. Certain it is that the jury had some evidence upon which to base their verdict, and there does not appear to have been anything in the case to show that the verdict was the result of passion or prejudice, nor for a sum greatly disproportionate to the injury.

3. As a third ground for reversing the judgment, the appellant assigns that the jury disregarded and disobeyed the instructions of the court. We are unable to see wherein the jury did so, nor have we any reason to believe that they failed to give the instructions proper regard and obedience. Considering the evidence, in connection with the instructions, we do not see that the verdict is antagonistic to the instructions.

4. The denial of the motion for nonsuit is assigned as error. The court would not have been justified in sustaining the motion, unless the misconduct of the respondent had appeared so clear that the court could have seen that a verdict in his favor would necessarily have to be set aside. *Schierhold v. North Beach & M. R. Co.* 40 Cal. 447. The evidence in the case does not show that the court could have seen such a result. The facts proven prior to the motion would have sustained a judgment for the respondent. It was not error, therefore, to overrule the motion.

5. It is alleged that the court erred in its giving and in its refusing instructions. The assignments in this regard are somewhat general, and in some respects entirely too general. It is not sufficiently specific to say that "the court erred in giving to the jury the said instructions which it did give of its own motion." Part of the charge is directed by statute. If the charge were bad in part, it would not be our province to examine it under such an assignment of error. However, from what we have said before, bearing upon the points raised in the instructions, it will be seen that we find no error in the giving of certain instructions, and in refusing others. It would certainly have been erroneous to have given the fourth and sixth instructions as requested by the appellant. Their modification was essential to a

correct presentation of the law. Had the court retained the word "could" in the fourth instruction so asked, it would have been a virtual impossibility for the respondent, no matter how free from negligence or blame, to have recovered a verdict in the case; because, to have done so, it would have been necessary for the jury to have found that it was not possible for the respondent to have been elsewhere at the time of the accident. This the jury could not have done; for, as a fact, it was possible for the respondent to have been elsewhere, even out of the mine. Bare possibilities should not control in such a case; they make a recovery an impossibility in any case, no matter what the merits of the case might be. Substituting the word "ought" for "could" changes the whole purport of the instruction, and puts it in accord with what we believe to be the law; at least, it makes the statement fully strong enough. If, in the discharge of his duties, or in accordance therewith, the respondent ought to have been elsewhere, he should not have recovered. The change in the wording of the instruction brought it within the proper rule.

It was not error to strike from the sixth instruction asked by the appellant the latter part thereof. To have retained it, would have made the instruction misleading and erroneous. It would have left out of the question entirely the fact that the "means of knowledge" were by law confined to the line of his employment. The charge of the court, including the instructions asked and given, taken together, gave the law fairly and correctly to the jury, as we view it. Upon the whole case we find no ground whereon to base a reversal of the decision of the court below. The judgment and order of the court below are affirmed.

ZANE, C. J., concurs. EMERSON, J., concurs.

(4 Utah, 231)

PEOPLE v. ROGERSON.

January Term, 1885.

CRIMINAL LAW AND PROCEDURE—TAX COLLECTOR FAILING TO PAY OVER MONEY COLLECTED—COMP. LAWS UTAH 1876.
Indictment examined, and held sufficient.

Zera Snow, for the People.

P. Denny, for defendant.

ZANE, C. J. This is an appeal from a judgment of the district court sustaining a demurrer to an indictment against the defendant. The indictment accuses the defendant of a felony, which is defined in the statute as follows:

"Every officer * * * of any county of this territory, * * * charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, who * * * willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over, is guilty of a felony." Comp. Laws Utah 1876, § 2068, p. 617.

The defendant insists that the indictment does not show that the offense occurred within the jurisdiction of the court. The defendant is described as the collector of Beaver county, Utah territory, and it is charged that he collected the taxes mentioned, as such officer. The crime consists in willfully omitting or refusing to pay them into the county treasury. The law requires that office to be kept at the county seat, and it was the duty of the defendant to pay there. The indictment states that the defendant willfully neglected and refused at all times to pay over the money, which is equivalent to saying he neglected and refused at all places as well, and therefore denies payment at the county seat of Beaver county, in which the indictment was found. The failure to pay at that place is the breach of duty complained of. The objection is not well taken.

It is also urged that the indictment is defective because there is no allegation therein that the collector had settled with the county clerk. The statute requires the collector of each county to settle with its clerk, and make full payment into its treasury of all taxes due, on or before the first Monday of May, each year. A breach of duty, in willfully failing to pay over money due, is charged—not in failing to settle. The indictment contains the allegation that the taxes mentioned came to the hands of the defendant between the first day of January, 1882, and the eighth day of May, 1883. The seventh of the latter month was the first Monday. The taxes in question were due on that day, and should then have been paid into the county treasury.

It is further claimed that the indictment does not show that there was a county treasurer qualified and authorized to receive such money, or that the money had not been paid into the treasury. The indictment charges that the defendant, as such collector, "feloniously and willfully refused to pay to the county treasurer of Beaver county, then and there being, and a public officer thereof." This language sufficiently designates the officer, and the law defines his authority and duties. The statement that the payment had not been made to the treasurer was equivalent to an allegation that it had not been paid into the treasury.

The court is of the opinion that the indictment is good. The judgment of the court below is reversed, the cause remanded, and the district court is directed to overrule the demurrer.

EMERSON, J., concurs. TWISS, J., concurs.

SUPREME COURT OF UTAH.

(4 Utah, 227)

UNITED STATES v. SIMPSON.

Filed June 13, 1885.

EVIDENCE—PROOF OF FIRST MARRIAGE—POLYGAMY.

On an indictment for polygamy, the fact of the first marriage may be proved by the declarations and admissions of the accused, and such declarations are proper to be considered by the jury as tending to prove an actual marriage.

W. H. Dickson, for the United States.

Chas. O. Whittemore, for appellant.

POWERS, J. The defendant was indicted for polygamy, tried, convicted, and sentenced to the penitentiary, in the Third district court of this territory. The substantial averments of the indictment were that he intermarried with one Emma Everett while at the same time his lawful wife, Hannah Powell Simpson, was living. The court charged the jury that if the evidence convinced them beyond a reasonable doubt that the defendant married Emma Everett, as charged, and that at the same time he had a lawful wife living, then they should find a verdict of guilty, provided the jury further found that the first marriage was lawful. The jury was instructed that, to establish the fact of marriage, it is not necessary to produce a marriage certificate, or any record evidence, neither need eye-witnesses of the ceremony be sworn; that marriage may be proven like any other fact, by the deliberate declarations or admissions of the defendant; but that the defendant could not be convicted unless it was proved beyond a reasonable doubt that he was guilty as charged in the indictment. The jury were also informed that they were the sole judges of the credibility of the witnesses, and of the weight to be given to the testimony.

The defendant urges that the court erred in charging the jury that they could infer marriage from the deliberate statements or admissions of defendant. None of the testimony is brought up with the record. We must therefore presume that there was evidence to sustain the charge that Hannah Powell Simpson actually existed, and that the marriage took place in this territory. In order to have arrived at a verdict of guilty, under the charge as given, the jury must have been convinced beyond a reasonable doubt that a lawful marriage had been entered into between this woman and the defendant.

In this territory there is no law regulating marriage. No form or ceremony is required, and no record of marriage is kept. Marriage is left as it was at common law, and a consensual marriage is, in all respects, valid. There need be no witnesses present. If the parties are competent to contract, all that is essential is a present agreement. The marriage is complete when there is a full, free,

and mutual consent by the parties capable of contracting, though not followed by cohabitation. *Caujolle v. Ferrie*, 26 Barb. 177. See *Bunting v. Lepingwell*, 4 Coke, 29; *Collins v. Jessot*, 6 Mod. 155; *Fenton v. Reed*, 4 Johns. 52; *Jackson v. Winne*, 7 Wend. 47; *Hutchins v. Kimmell*, 31 Mich. 130; *Graham v. Bennet*, 2 Cal. 503; *Case v. Case*, 17 Cal. 598; *Rose v. Clark*, 8 Paige, 574; *Com. v. Stump*, 53 Pa. St. 132.

Cohabitation is but one of the many incidents to the marriage relation. It is not essential to it. *Murphy v. Ramsey*, 114 U. S. 42; S. C. 5 Sup. Ct. Rep. 747. Under our law, a marriage depends solely upon the mutual consent of the contracting parties. They may enter into the marriage relation secretly, and the fact may be unknown to all save the man and woman. As was said on the argument, a couple may meet on the highway at any time in the day or night, and there contract a valid marriage. Whether it tends to good morals to leave the matter thus loose, and completely at the will of the parties, it is not for us to discuss. That is a matter for the legislature. We have to take the law as we find it.

No particular form or ceremony being essential, and no witness being required, the question that arises is, how shall the fact of marriage be proven? Surely it is not necessary to produce a marriage certificate or record evidence, for the law requires none. Clearly the ceremony need not be proven by eye-witnesses, for a marriage is valid without witnesses, and no ceremony is necessary. If evidence of that nature were required, people might transgress the laws prohibiting polygamy with impunity. A man could secretly marry as many women as he pleased, and the law could not reach him. Proof that two parties have treated each other as husband and wife, have lived together as such, and have held each other out to the world as such, is sufficient to enable a court or jury to find that at some previous time the parties did, as a fact, consent to be married,—did, as a fact, agree to be husband and wife. This is the conclusion of all the decisions of authority. The previous actual consent or agreement to be husband and wife is the ultimate and essential fact the jury must find. The mode of life, the holding out, the declarations or admissions of the accused, and the like, are circumstantial evidence from which the fact may be inferred. 4 W. C. R. 51, note.

The conclusion at which we arrive is that, in order to prove the first marriage, on an indictment for polygamy, it is not necessary to produce eye-witnesses of the ceremony. Neither is it necessary to produce a marriage certificate or other record evidence. Marriage may be proven by the declarations and admissions of the accused, and such declarations are proper to be considered by the jury as tending to prove an actual marriage. If such declarations convince the jury beyond a reasonable doubt that the parties were married, that is all that is required. *U. S. v. Miles*, 2 Utah, 19; *Miles v. U. S.* 103 U. S. 311.

While the instructions complained of might have been more carefully worded, still the charge, when taken as a whole, carefully guarded the rights of the defendant, and he was not injured thereby; and the judgment of the court below should be affirmed.

ZANE, C. J.; and BOREMAN, J., concur.

SUPREME COURT OF CALIFORNIA.

(67 Cal. 112)

PEOPLE v. LENNOX. (No. 20,054.)

Filed June 4, 1885.

1. MURDER—PLEA OF GUILTY—WITHDRAWAL AFTER JUDGMENT.

Where a defendant accused of murder, withdraws his plea of not guilty voluntarily, and pleads guilty, and thereupon the degree of the crime is fixed by the court as murder in the first degree, and he is sentenced to be hung, it is too late for him then, though before the judgment is entered by the clerk in the record, to withdraw his plea of guilty, and to plead not guilty, on the ground that he was misled in withdrawing his plea of not guilty and pleading guilty, in that he had done so on the belief expressed by his attorney and others that if he pleaded not guilty, and was tried by a jury, the jury would find him guilty, and affix the death penalty, while, if he pleaded guilty, the court might, in the exercise of its judgment, fix the punishment at imprisonment for life. The refusal of the court to allow such course is not error.

2. CRIMINAL TRIAL—WAIVER OF TRIAL BY JURY BY PLEA OF GUILTY.

By a plea of guilty on a trial for murder the defendant waives his right of trial by jury; on authority of *People v. Noll*, 20 Cal. 164.

Department 2. Appeal from the superior court of the county of Los Angeles.

John T. Godfrey, for appellant.

The Attorney General, for respondent.

MYRICK, J. The defendant was accused by information of the crime of murder. He was arraigned and pleaded not guilty, and the cause was set for trial. On the day set, September 4, 1884, the defendant by his counsel moved the court for leave to withdraw his plea of not guilty, and offered to plead *nolo contendere*. The motion was objected to by the district attorney, and was denied by the court. The defendant then asked leave to withdraw his plea of not guilty, which motion was granted. The defendant then pleaded guilty. Thereupon the court proceeded to hear evidence for the purpose of fixing the degree of the crime. Witnesses were examined, as well those offered by the defendant as for the prosecution,—some 30 in all. After hearing the evidence the court fixed the degree of the crime to be murder in the first degree, and set September 11, 1884, as the day on which the punishment should be determined. On that day, the court, referring to section 190, Penal Code, and to the testimony which had been taken, declared to the defendant that the discretion to be exercised by the court, as to whether the punishment should be death or imprisonment for life, was the same as that to be exercised by a jury determining the same question, and that "from the evidence in this case I can find no circumstances of mitigation, but many of aggravation; the fact that your passions were inflamed with strong drink can furnish no extenuation. I must therefore adjudge that you be taken hence by the sheriff of this county to its county jail, where you will be by him retained until, at a time and place to be hereafter determined by the court, you will be hanged by

the neck until you are dead." Thereupon, and before the clerk had entered the judgment in the record, the defendant's attorney moved the court to permit the defendant to withdraw the plea of guilty, and to plead not guilty, on the ground that the defendant had been misled in withdrawing his plea of not guilty and pleaded guilty. The reasons given in the record why the defendant deemed himself misled in pleading guilty were because his father, a deputy-sheriff, and his attorney expressed to him the belief that if he pleaded not guilty and was tried by a jury, the jury would find him guilty and affix the death penalty; whereas, if he pleaded guilty, they believed the court might, in the exercise of its judgment, fix the punishment at imprisonment for life.

We see no error. The defendant, with his own knowledge of what he had done, with the concurrence of his attorney and such others as he sought advice of, pleaded guilty to the charge. The court, in compliance with section 1192, Penal Code, determined the degree, and, after hearing evidence, determined, in compliance with section 190, Penal Code, the punishment. All the proceedings seem to have been according to law. Not until after the court had performed its duty of fixing the punishment did the defendant express any desire to reconsider his plea of guilty. The point that the defendant could not, by pleading guilty, waive a trial by jury, is answered adversely to him by the decision in *People v. Noll*, 20 Cal. 164.

The judgment and the orders appealed from are affirmed, and the cause is remanded to the superior court of Los Angeles county, with directions to proceed according to law in carrying the sentence into execution.

We concur: SHARPSTEIN, J.; THORNTON, J.

(67 Cal. 116)

ROSBOROUGH v. BOARDMAN. (No. 9,947.)

Filed June 6, 1885.

1. COUNTY OFFICERS—ASSESSOR OF ALAMEDA COUNTY.

There was no such office as "county assessor of Alameda county" after the abolition of such office by the California act of February 10, 1874, and prior to the first Monday after the first day of January, 1885, the date when the county government act of March 14, 1883, went into effect.

2. SAME—CONSTITUTIONALITY OF ACT ABOLISHING OFFICE.

The California statute of February 10, 1874, abolishing the office of "county assessor of Alameda county," is constitutional, and is not repealed by the amendment to section 4109 of the Political Code, which went into effect March 7, 1881.

3. VACANCY IN PUBLIC OFFICE, HOW CREATED.

No vacancy can occur in a public office in California except on the happening of one of the events specified in section 996 of the Political Code.

In Bank. Application for *mandamus* to compel the auditor of Alameda county to audit petitioner's demand and draw a warrant for his salary as county assessor of Alameda county. The opinion in bank, on a former hearing, is reported in 6 PAC. REP. 449.

R. A. Redman, for petitioner.

S. P. Hall, W. R. Davis, and E. C. Robinson, for respondent.

SHARPSTEIN, J. If there was not, immediately preceding the date of the passage of the act to "establish a uniform system of county and township governments," (approved March 14, 1883,) any such office as that of "county assessor of Alameda county," there is not any such office now, unless it was created by some provision of that act; and if such an office was created by any provision of that act, such provision did not take effect prior to the first Monday after the first day of January, 1885, as clearly appears by section 181:

"Any provision of this act creating a county office in any county shall not (except for election purposes) take effect prior to the first Monday after the first day of January, eighteen hundred and eighty-five." St. and Amdts. to Codes 1883, p. 365.

The petitioner's alleged appointment was made prior to the first day of January, 1885, and before any provision of the act of March 14, 1883, "creating a county office" in Alameda county had taken effect. Petitioner, however, insists that the act of February, 10, 1874, which abolished the office of county assessor of Alameda county and created township assessors, was repealed by an amendment to the Political Code. But this amendment, although passed subsequently to the act of February 10, 1874, became a part of the Political Code which went into effect prior to the passage of said act. As originally adopted the Code denominated and enumerated the officers of a county. Pol. Code, § 4103.

By the subsequent act of February, 10, 1874, the provision of that Code, making "an assessor" a county officer of Alameda county was repealed. The amendment of the Code which took effect March 7, 1881, does not expressly repeal nor is it repugnant to any of the provisions of the act of February 10, 1874. It simply fixes the time of the election of the several officers enumerated in it. Pol. Code, § 1409. But for the act of February 10, 1874, this amendment would have applied to Alameda county as fully as to any other. After the passage of the act of February 10, 1874, Alameda county was as clearly excepted from the operation of the original Code, so far as it related to the office of county assessor, as if the exception had been made in that Code. And if it had been, we think no one would seriously contend that the exception was repealed or in any way affected by the amendment of March 7, 1881. The amendment does not create any offices. It simply provides when elections shall be held for filling those already created. It must be read in connection with the other provisions of the Code in which it is incorporated. And being so read it cannot be held to repeal by implication an act which was passed after the adoption of the Code, and which in no way relates to the subject to which the amendment relates, viz., the time of electing county officers.

, There is another ground on which we think this application must

be denied. The power of the supervisors to appoint petitioner depended on there being a vacancy in the office; and an office becomes vacant on the happening of any of the events enumerated in section 996, Pol. Code, among which the event relied on in this case is not mentioned. The enumeration in the Code must be held to be exclusive. *People v. Tilton*, 37 Cal. 621; *Stratton v. Oulton*, 28 Cal. 51; *People v. Bissell*, 49 Cal. 411.

In *Mitchell v. Crosby*, 46 Cal. 97, this court said: "When the Code mentions assessors it must be construed as meaning district assessors as well as county assessors, so long as the present district assessors remain in office," which would be until the happening of one of the events enumerated in section 996, Pol. Code, or the election and qualification of their successors. *Id.* § 876.

Thus far we have assumed that the act of February 10, 1874, was constitutional. Counsel for petitioner insists that it was not. It was passed while the late constitution was in force, and if, during that period, it or a similar act was held to be constitutional, the question must now be regarded as settled. In *People v. Central P. R. Co.* 43 Cal. 398, the constitutionality of an act which provided for the election of district assessors for Placer county was attacked on the same grounds that the constitutionality of the act under which township assessors for Alameda county were elected is now attacked, and was held to be constitutional. In *People v. Placerville & S. V. R. Co.* 34 Cal. 656, it was held that in El Dorado county, which was divided into revenue districts corresponding to the several townships, the authority of each assessor was limited to the district within and for which he was elected; implying that within their respective districts they had the power to assess property. These cases are in our opinion decisive of the question.

As the right of the petitioner depends (1) on there being such an office, as that which he claims to have been appointed to fill, at the date of his alleged appointment; and (2) on there being a vacancy in the office at that date,—it follows from the foregoing that his application for a writ to compel the respondent to draw his warrant on the treasurer for the payment of his (petitioner's) salary as "County Assessor" must be denied.

Application denied.

We concur: MYRICK, J.; ROSS, J.; MCKINSTRY, J.; MORRISON, C. J.

THORNTON, J. I concur in the judgment in this cause, and in the opinion except as to that portion which relates to vacancies in office and the effect attributed to section 996, Pol. Code. I am of opinion that an office is vacant which has never had an incumbent legally elected or appointed; and becomes vacant where the term fixed by law of the incumbent thus legally elected or appointed has expired, though he may hold over until his successor is elected or appointed

and has qualified. If this is not so, the term of certain officers is extended by an act of the legislature (section 996, Pol. Code) in direct violation of the last clause in section 9, art. 11, of the constitution. There may be other cases where an office becomes vacant in the sense of the words "becomes vacant" employed in article 5, § 8, of the constitution, not mentioned above, or defined in section 996. The question discussed in the portion of the opinion to which I cannot give my assent, does not arise in the case, for when it is said, as it is in the opinion, that "the petitioner's alleged appointment was made prior to the first day of January, 1885, and before any provision of the act of March 14, 1883, creating a county office in Alameda county had taken effect," the question as to vacancy is determined, and that by holding that there was no vacancy at that time.

ROBINSON v. BOARDMAN. (No. 10,046.)

Filed June 6, 1885.

JUDGMENT REVERSED.

On authority of *Rosborough v. Boardman*, ante, 261, judgment reversed.

In bank. Appeal from the superior court of Alameda county.

W. R. Davis and *E. C. Robinson*, for appellant.

J. C. Martin and *G. P. Hall*, for respondent.

By THE COURT. This case is the reverse of that of *Rosborough v. Boardman*, ante, 261. Here the writ is prayed to compel the defendant to audit the claim of the plaintiff for his salary as a district assessor of Alameda county. The court below denied the application, which, according to the views expressed in the opinion filed in *Rosborough v. Boardman*, supra, should have been granted.

Judgment reversed and cause remanded, with directions to the court below to issue the writ as prayed.

(67 Cal. 120)

McCRARY v. BEAUDRY. (No. 9,895.)

Filed June 10, 1885.

1. WATER—TAKING FOR DISTRIBUTION AND SALE—PUBLIC USE—MANDAMUS.

Water appropriated for distribution and sale is, *ipso facto*, devoted to a public use, and a party who conforms to the requirements of the person so appropriating, and offers to pay the fixed rate for the water, is entitled to enforce his right to be furnished with water by *mandamus*.

2. AFFIDAVIT FOR MANDAMUS—OMISSION OF TITLE OF ACTION.

An affidavit for *mandamus* may be treated as a complaint, and still, to all intents and purposes, have the effect of such an affidavit. The fact that such affidavit lacks the title of the action or proceeding in which it is issued, will not invalidate it as such.

Department 2. Appeal from the superior court of the county of Los Angeles.

Walls & Lee, for appellant.

J. F. Godfrey, for respondent.

SHARPSTEIN, J. This is an appeal from a judgment that a writ of mandate issue as prayed in the affidavit of plaintiff. The affidavit was properly treated as a complaint, which was demurred to by defendant on several grounds, the principal one of which is that it did not state facts sufficient to constitute a cause of action. The complaint shows with reasonable certainty that the defendant obtained from the city of Los Angeles permission to lay water-pipes in the streets of said city, for the conveyance of water for his use and that of the citizens residing in what is known as "the hilly section" of said city, "to whom he might sell or give water." That after obtaining such permission, the defendant laid pipes in said streets and through them conducted water to said section, which he sold to the residents of said section, of whom the plaintiff was one, at certain monthly rates, which the plaintiff paid until November, 1884, when the defendant, without any valid excuse for so doing, shut the water off from the plaintiff's premises and refused to turn it on again. Appellant insists that the facts alleged are not sufficient to impose on him any duty or obligation to furnish the respondent with water.

It appears sufficiently clear that appellant had appropriated water for distribution and sale, and that he had acquired and was exercising the right to collect rates from the inhabitants of the city of Los Angeles for the use of it; and the use of all water appropriated for sale, rental, or distribution is declared by the constitution to be a public use; and the right to collect rates or compensation for the use of water by the inhabitants of any city is a franchise which cannot be exercised except by authority of and in the manner prescribed by law. Const. art. 14. Whenever water is appropriated for distribution and sale, the public has a right to use it; that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it, in a reasonable manner. Water appropriated for distribution and sale is, *ipso facto*, devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated it.

In one part of the affidavit it is stated that affiant "has been paying the said Beaudry for said water at the regular rates established and demanded of affiant by said Beaudry," and in another "that affiant has been paying said V. Beaudry for water for use on said premises for domestic and irrigating purposes during the eight months last past at the rate of \$2.25 per month, and affiant alleges that he has been at all times, and is now, ready and willing to pay to said V. Beaudry the sum of money fixed as the established rate for use of water on said premises, which he alleges was, and is now, the sum tendered as aforesaid, to-wit, the sum of \$2.25 per month; and that no greater sum has been, nor is now, demanded by said Beaudry for the use of water on said premises for domestic use and irrigating purposes." Reading the two paragraphs together it appears that the

rate established by appellant for supplying respondent with water was \$2.25 per month, which he paid as long as he was supplied with water, and has at all times since been ready and willing to pay.

The facts alleged in the complaint show to our satisfaction that the appellant was in the exercise of a franchise which he could not exercise except by authority of and in the manner prescribed by law, and that the law enjoined on him the duty, resulting from that trust, of furnishing the respondent with water. The writ was issued, according to the requirement of the Code, upon the affidavit of respondent, the party beneficially interested; and such affidavit was as valid and effectual without the title of the action or proceeding in which it was made, "*for any purpose, as if duly entitled.*" Code Civil Proc. § 1046.

The affidavit in a case like this may be treated as a complaint, and still remain an affidavit to all intents and purposes. We think the demurrer was properly overruled.

Judgment affirmed.

We concur: MYRICK, J.; THORNTON, J.

SUPREME COURT OF KANSAS.

(33 Kan. 580)

BAKER v. MORRIS.

Filed June 4, 1885.

1. PARENT AND CHILD—LIABILITY FOR NEGLIGENT WRONG OF CHILD.

Where a minor son negligently and carelessly shoots and kills a mare belonging to another, the father, who had no connection with the transaction, directly or indirectly, proximately or remotely, is not liable.

2. SAME—PROMISE OF FATHER TO MAKE COMPENSATION.

And where the father afterwards, without consideration and not in writing, promises to pay the value of the mare, *held*, that such promise does not render him liable.

3. SAME—LIABILITY OF CHILD.

In such case the son only is liable.

Error from Greenwood county.

T. L. Davis, for plaintiff in error.

Clogston & Fuller, for defendant in error.

VALENTINE, J. The only question presented to this court for determination is whether the following bill of particulars sets forth facts sufficient to constitute a cause of action. The bill of particulars reads as follows:

"*The State of Kansas, Greenwood County—ss.:*

"BEFORE GRANVILLE GRIFFITH, A JUSTICE OF THE PEACE FOR SAID COUNTY.

"*W. M. Morris, Plaintiff, v. J. L. Baker, Defendant.*

"(Amended bill of particulars.)

"Now comes the above plaintiff, and for cause of complaint against said defendant says that said defendant is justly indebted to him in the sum of seventy-five dollars, as follows, to-wit: That on or about the twenty-first day of December, A. D. 1883, one Frank Baker, a son of said defendant and a minor, did negligently and carelessly fire and shoot off a gun in the direction of the stable of said plaintiff; that said stable contained one mare pony, the property of said plaintiff; that said shot so fired and shot off penetrated the said stable, and struck and killed said mare, said property of said plaintiff; that said mare was of the value of \$75, thereby damaging said plaintiff in the sum of \$75. Plaintiff further says that, after said death of said mare, said plaintiff requested said defendant to pay for said mare so killed; that defendant agreed so to do, but has failed so to do. Plaintiff therefore says that said defendant voluntarily, and of his own free will, did, immediately after the injuries and damages complained of hereinbefore, come to plaintiff and said he would pay this plaintiff the full value of said mare so killed by his said son, thereby ratifying and confirming the said acts of his son Frank, and thereby becoming responsible to plaintiff for the damages sustained by plaintiff; therefore, plaintiff prays judgment against said defendant for the sum of \$75 and costs."

Under the authority of the case of *Edwards v. Crume*, 13 Kan. 348, the defendant below (plaintiff in error) is not liable, unless by his subsequent promise and supposed ratification he has made himself liable. In that case it is held as follows:

"Where a minor son who lives with his father and is under his father's control, commits certain wrongful acts, but where the said acts have not been authorized by the father, are not done in his presence, have no connection with the father's business, are not ratified by the father, and from which the father receives no benefit, the father is not liable in a civil action for damages for such wrongful acts."

See, also, Schouler, Dom. Rel. 361. The promise made by the defendant to pay the plaintiff for the mare killed is not valid. It was a collateral undertaking, made without consideration, and was not in writing, (section 6, St. of Frauds;) and there was no ratification of the defendant's son's acts, except such as resulted from the promise itself, and this in fact was no ratification at all. The defendant might have disapproved the son's acts wholly and entirely, and condemned them severely, and yet promised to pay the value of the mare killed. The defendant had nothing to do with the killing of the mare, directly or indirectly, proximately or remotely. It was not done in his name nor in his presence, nor authorized by him; nor had it any connection with his business; nor was it any benefit to him; nor has he received any benefit therefrom, or from any transaction connected therewith, or with this case; nor has the son's liability been relinquished or released; nor has the father, by mutual agreement of the parties, been taken in the place of or substituted for the son. Under the circumstances, the son only is liable, and not the father.

The judgment of the court below will be reversed, and cause remanded for further proceedings.

(All the justices concurring.)

(33 Kan. 588)

In re Petition of SUPPE for the Writ of *Habeas Corpus*.

Filed June 4, 1885.

1. PRACTICE—ORDER OF ARREST—POWER OF DISTRICT JUDGE AT CHAMBERS.

The judge of the district court at chambers has no power or authority to review the action of the district court, vacating and setting aside an order of arrest, and cannot revive an order of arrest that has been discharged by the court.

2. SAME—EXPIRATION OF TERM.

As to whether it is within the power of the district court to rescind its action, and restore an order of arrest, after the term in which the order was vacated and the petition discharged, *quære*.

Original proceedings in *habeas corpus*.

Kellogg & Sedgwick, Scott & Lynn, and *I. E. Lambert*, for plaintiff.

Cunningham & McCarty and *Buck & Feighan*, for respondent.

JOHNSTON, J. This is an original proceeding in *habeas corpus*, whereby the petitioner, W. H. Suppe, seeks to effect a release from the custody of the respondent, J. H. Wilhite, who is the sheriff of Lyon county. The question presented in the case is whether a judge of the district court, in vacation, at chambers, can review and rescind the order and judgment of the district court vacating and setting aside an order of arrest.

The question arises in this wise: On December 6, 1884, Rudolph Wurlitzer & Bro. brought a civil suit in the district court of Lyon county, for the recovery of money, against W. H. Suppe. At the same time the plaintiffs in that action filed an affidavit and bond to obtain the issuance of an order of arrest. The clerk of the court accordingly issued an order of arrest, upon which the defendant Suppe was taken in custody by the respondent. Suppe immediately gave notice that on December 8th he would move the court, which was then in session, to vacate the order of arrest and discharge him from imprisonment. A hearing was accordingly had upon this motion, and the court determined and adjudged that the order of arrest under which Suppe was held, be set aside and vacated. Afterwards, and on the eleventh day of December, 1884, when the district court of Lyon county had adjourned *sine die*, the plaintiffs in the civil action prepared and presented to the district judge, at his chambers in Greenwood county, an additional affidavit, and the judge, upon their application, in an *ex parte* hearing, ordered "that the order made by the court in the matter of the arrest of the within-named defendant on December 8, 1884, whereby said defendant was discharged from arrest, is hereby suspended and set aside." The sheriff, evidently thinking that this order of the judge had the effect to revive the process, arrested the petitioner upon the order of arrest theretofore vacated and set aside by the court. The petitioner complains of this second arrest, and contends that his imprisonment is illegal.

The district judge at chambers, as has been seen, assumed to review the action of the district court, and to set aside its judgment vacating an order of arrest, and undertook to revive process that had been annulled by the court. This the judge had no power or authority to do. The district judge at chambers can only exercise such power as is expressly conferred by law. Power is given the judge at chambers to vacate orders of arrest, but no provision of statute has been cited or found that would authorize the district judge to review and correct the action of the district court, or restore process that has been discharged by the court. When the order of arrest was vacated it became *functus officio*, and it is questionable whether it was within the power of the district court to recall and change its order annulling the order of arrest after the term in which it was made, and to revive process that it had vacated; though as to that we do not decide; but certainly no such revisory power exists in the judge at chambers. *People v. Bowe*, 81 N. Y. 43; *In re Bradner*, 87 N. Y. 171.

As the order of arrest under which the petitioner is restrained has been vacated and is dead, it follows that his imprisonment is illegal, and he must therefore be discharged.

(All the justices concurring.)

(33 Kan. 668)

BERTENSHAW and another v. HARGROVE, as Sheriff, etc., and another.

Filed June 5, 1885.

APPEAL—INJUNCTION PENDING LITIGATION.

Error from Atchison county.

Jackson & Royse and L. F. Bird, for plaintiffs in error.*Mills & Wells*, for defendants in error.

PER CURIAM. This was an action brought in the district court of Atchison county, Kansas, by Charles Henry Bertenshaw and Mary Maud Bertenshaw, against Linn B. Hargrove, as sheriff of Atchison county, Kansas, and John Belz, to enjoin the sale of certain real estate. The plaintiffs also asked for a temporary injunction pending the litigation. The application for the temporary injunction came on for hearing before the court, both parties being present, and after the hearing of the application the court refused to grant the injunction, and from such refusal the plaintiffs bring petition in error to this court. The plaintiffs in error have also filed a motion asking this court to grant an order restraining and enjoining the defendants, and each of them, from selling or disposing of the real estate in controversy until the case can be finally decided in this court. This motion came on for hearing before the supreme court, and not only the motion, but the merits of the application in the court below for the temporary injunction, were thoroughly discussed; and this court is now fully prepared to render a decision upon the question as to whether the temporary injunction should have been granted or not. We think the temporary injunction should have been granted.

The questions upon the final hearing of the case are not free from doubt, and whether they should be finally decided in favor of the plaintiffs, or in favor of the defendants, we are not prepared to say, and do not wish to express any opinion with reference thereto. But, as before stated, the questions to be finally decided are of such a serious character that we think the temporary injunction should be granted, and should remain in force until the case can be finally decided upon its merits. No material harm can result from granting the temporary injunction, while serious harm and difficulty might result if it is not allowed. To permit the sale to proceed before these other questions are determined, might so complicate the conflicting rights of the parties that they could only be afterwards settled with great difficulty, and possibly with much litigation. We have, therefore, although a little irregular, concluded to decide this petition in error upon its merits.

We shall therefore reverse the decision of the district court, and remand the case, with the order that the temporary injunction shall be granted.

SUPREME COURT OF NEVADA.

(19 Nev. 121)

SUTRO TUNNEL CO. v. SEGREGATED BELCHER MIN. CO.

Filed June 10, 1885.

1. STATUTE OF LIMITATIONS—NEVADA—FOREIGN CORPORATIONS.

In the absence of any words in section 21 of the statute of limitations of Nevada limiting or restricting its provisions to a certain class of cases, or to certain sections of the statute, the intention of the legislature in passing that section seems to have been that it should apply to all causes of action; foreign corporations as well as individuals absent from the state; to contracts made out of the state to be performed within it, as well as to contracts made within the state.

2. CONTRACT CONDITION AS TO ARBITRATION—PAYMENT OF MONEY.

The provision in a contract between two parties, whereby all disputes between them are to be submitted to arbitration before being made the subject of litigation in the courts, is not binding upon the parties when the controversy arises out of the non-payment of a sum of money, stipulated in the contract, to be paid.

3. SAME—CORPORATION—ULTRA VIRES—INCIDENTAL POWERS.

A contract by a corporation, made for the purpose of carrying out the immediate purposes for which such corporation was formed, is not *ultra vires*, and may be enforced as having been made under one of the incidental powers.

4. SAME—PROMISE TO PAY SPECIFIC AMOUNT FOR WORK TO BE PERFORMED—ESTOPPEL.

After executing a contract, thereby specifically binding himself to pay a certain sum per foot for the construction of a tunnel, a party is estopped from averring, in defense of his not paying, that the tunnel could have been constructed at a cost less than the sum he so bound himself to pay.

5. SAME—BREACH OF—JUDGMENT—INTEREST—RATE PER CENT.—PLACE OF PERFORMANCE.

In a case where the interest is given as damages for the breach of a contract, the rate of interest allowed by the laws of the state where the contract is to be performed, should govern.

Appeal from a judgment of the First judicial district court, Storey county, entered in favor of the plaintiff.

B. C. Whitman, for appellant.

M. N. Stone, for respondent.

HAWLEY, J. On the twenty-sixth day of March, 1866, an agreement was entered into by and between the trustees for the Sutro Tunnel Company, an association then existing under the laws of this state, it being the predecessor in interest of the present corporation, respondent herein, and the Gould & Curry Silver Mining Company, then a mining corporation, with reference to the construction of the Sutro tunnel, under the act of the legislature of this state, approved February 4, 1865, (St. 1864-65, p. 128,) and the royalty to be paid by the mining corporation for the extraction of ore after the drainage of its mine by the tunnel.

On the twenty-ninth of March, 1879, the parties to this suit, in the city of San Francisco, state of California, made and entered into an agreement, which recites that the agreement dated March 26, 1866, "between the said parties thereto, for the construction of a tunnel

known as the 'Sutro Tunnel,' is hereby made and constituted the agreement by and between the parties hereto, and recognized as existing and binding between the parties hereto, subject to the changes and modifications hereinafter contained, which are hereby agreed to and adopted, whether specific reference be herein made to the portions of said agreement hereby changed and modified or not." This new agreement contains 14 separate articles relating to the construction of lateral tunnels, drainage of the mining ground, royalty to be paid for ore extracted from appellant's mine, etc. Under the provisions of article 4 respondent agreed to construct a lateral tunnel from and to certain named points, of specified dimensions, to be provided with a suitable drain for the flow of water coming into it from the mine owned by appellant; the said lateral tunnel to be the property of respondent. Under article 6 appellant "agrees to advance to said party of the first part in gold coin of the United States, on the fifth day of each and every month, seventy dollars for every linear foot of said lateral tunnel" constructed during the preceding month. It is agreed that the sum so advanced shall not constitute a direct liability against respondent, but may be discharged as provided in article 7. It is further agreed that if appellant fails to pay respondent in the manner stated, it will be liable for all direct and consequential damages resulting from such default. In article 7 respondent agrees that the advances made by appellant under the provisions of article 6 may be repaid by appellant, deducting one-half the charges that may be due respondent upon each ton of the ore extracted from appellant's mine, until the sum so withheld shall amount to the whole sum to be advanced for the construction of the tunnel. It does not appear that any ore was extracted from appellant's mine after the execution of the contract.

This action was brought to recover the amount due for the construction of 171 linear feet of said lateral tunnel, and for the consequential damages resulting from the non-payment of the same. Appellant and respondent are corporations organized and existing under, and by virtue of, the laws of the state of California.

1. The first question to be considered involves a construction of the statute of limitations. 1 Comp. Laws, §§ 1016-1048. Can a foreign corporation, in a case where the contract was made out of this state, plead the provisions of this statute? Does section 21 of the statute refer to the provisions of section 32 as well as to section 16? Appellant contends that the statute in question is different from that of other states; that in effect it should be classified and treated as two distinct statutes,—one preceding section 32, the other including it and subsequent sections; that the latter statute is *unique* in its character and is independent of all the provisions contained in the first statute. This position is a novel one, and has been presented in an ingenious and plausible manner; but the question arises whether it can be supported by the crucial test applied in the construction of all stat-

utes,—the intention of the legislature. Did the legislature intend that such a construction should be placed upon its work? Was it within the thoughts of the members of that body when enacting the original provisions in 1861, or when adopting the amendments of 1867? In considering these questions we are irresistibly led to the conclusion that such was not the intention of the legislature. When the amendments of 1867 were enacted, they became a part of the law of 1861. The law thereafter, as before, was embodied in one statute upon the subject, and must be treated as an entirety. When the amendments of 1867 were made, sections 21 and 32 were both revised. The whole subject was before the legislature. It necessarily follows that if section 21 applied to section 32 in the original act, it is also applicable in the act as amended. The question, then, is whether section 21 was ever intended to apply to section 32. The language of section 21 is general in its terms. There are no restrictions to any specified class of cases or causes of action.

In *Robinson v. Imperial Silver Min. Co.* 5 Nev. 75, this court declared that the expression "cause of action" in section 21 includes actions concerning real estate as well as personal actions. Section 21 was inserted for the purpose of creating an exception to the general rule as to the time when the cause of action, whatever it might be, should be commenced; the exception being the absence of the defendant from the state. There is not, in our opinion, any substantial reason why the provisions of section 21 should not be made applicable to the class of cases mentioned in section 32, as well as those mentioned in section 16. In the absence of any words in section 21 limiting or restricting its provisions to a certain class of cases or to certain sections of the statute, we are of opinion that it was the intention of the legislature that it should apply to all causes of action; to foreign corporations, as well as individuals absent from the state; to contracts made out of the state, to be performed within it, as well as to contracts made within this state.

2. The next question presented for our determination arises under the provisions of article 15 of the first agreement, executed in March, 1866:

"If any question should arise between the parties to this agreement, either in respect to the time when the mine of the party of the second part shall have been drained in accordance with the foregoing articles, and the payment of two dollars per ton for ore extracted should commence, or in respect to the amount of money at any time due or payable from the party of the second part to the parties of the first part, it is agreed that such question shall be determined by each party choosing one competent and disinterested person as an arbitrator; and in the event of disagreement between such arbitrators, they shall choose a third competent and disinterested person. The arbitrators shall be sworn, and a majority of the three may decide the disagreement between the parties hereto, and their decision shall be final."

Under this clause of the agreement, was respondent bound to arbitrate, or make an effort to arbitrate, the disagreements between it
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and appellant, before commencing this action? It is questionable whether this article has any application to the facts of this case. It will be observed that the agreement of 1866 is adopted "subject to the changes and modifications" contained in the agreement of 1879. The article in question related to the main tunnel, to its construction and maintenance, and to the rights and privileges of the mine-owners therein. The main tunnel was not then completed to the Comstock lode, and many questions were liable to arise as to when the tunnel should in fact drain the mines, or when the payment of royalty for ore extracted should begin; and a disagreement upon either of these questions necessarily involved the other in respect to the amount of money that might, at any time, be due or payable between the parties. The differences which arose between the parties are assigned as a reason for the making of the new contract, containing modifications and changes of a substantial nature, as follows: "And, whereas, both of the parties hereto are desirous of adjusting all differences existing between themselves, and of preventing a recurrence thereof in the future," etc.

Under these circumstances, it would seem that the fifteenth article of the original agreement was not applicable to the new condition of affairs under the contract of 1879. But if we concede, for the sake of the argument, that it must be considered as of binding force, what was there in dispute between these parties that required an arbitration to be made? Bear in mind that no controversy is presented in the record as to the length of the lateral tunnel, or its completion in accordance with the specifications, and that the amount of money to be advanced, as well as the time of payment, is expressed in the agreement. Upon this state of facts, what could have been accomplished by arbitrators under the limited authority given them in the covenant under consideration? There was no dispute "in respect to the time when the mine" of appellant should be drained; no dispute as to when the payment "for ore extracted should commence;" and no dispute "in respect to the amount of money at any time due or payable" from appellant to respondent,—within the power or province of the arbitrators to adjust even if they had been appointed. The only question in dispute as to the amount of money due arises from the contention of appellant that it was only responsible for the actual cost of the construction of the tunnel, and, as we shall have occasion hereafter to state, that contention cannot be legally sustained.

The case at bar, therefore, bears no analogy to the covenants contained in insurance policies, with reference to the mode of ascertaining the loss in case of the destruction of the property insured, or any part of it, by fire. There are other authorities which hold that if provision is made for the settlement of disputes by arbitration, in regard to the value of work to be done or the price of materials to be purchased, where no fixed value is stated in the contract, the arbitration must be had before the action to recover the price can be main-

tained; but where the contract itself fixes the price to be paid and the time of payment, courts invariably take cognizance of the action, and determine the legal disputes between the parties without regard to the clause in the contract providing for an arbitration. See authorities cited by respondent. This principle is recognized in *Old Saucelito L. & D. D. Co. v. Commercial U. A. Co.*, cited by appellant, wherein the court, upon this subject, said:

"It is well settled that a general provision that all disputes which may arise in the execution of a contract shall be decided by arbitrators, will not be allowed to deprive the courts of their jurisdiction. But the parties to a contract may fix on any mode they think fit to liquidate damages *in their own nature unliquidated*, and, *in such case*, no recovery can be had until the prescribed method has been pursued, or some valid excuse exists for not pursuing it." 5 PAC. REP. 232.

This is not *such a case*, and the appointment of arbitrators was not a condition precedent to be performed prior to the commencement of this action.

3. We shall not stop to inquire, in the determination of the next point presented by appellant, whether the agreement of 1866 was valid as between the original parties, or whether it was void because based upon a law (St. 1864-65, 128) which it is contended was an unconstitutional grant. Suppose the old agreement to have been void at the time of its execution, or, if valid, that the special grant of the statute lapsed before the agreement of 1879 was made: would these facts deprive respondent of its right to maintain this action under the second agreement? We think not. Would not the new contract be binding between the parties to this action, although the old agreement might have been held void as between the parties thereto? Could not the parties to the new agreement adopt such covenants, in the other agreement, as they deemed applicable to the new, although that instrument was absolutely void between the parties to it? We think they could. Moreover, the covenants in relation to the price to be advanced for every linear foot of the lateral tunnel constructed by respondent are embodied in the new agreement, and can be enforced without reference to any of the covenants and conditions contained in the agreement of 1866.

4. We now come to the fundamental proposition: Did appellant have any authority, under its charter, to make the contract in question? Appellant is a mining corporation, organized for the purpose of gold and silver mining in the Gold Hill mining district, in Storey county. The construction of the lateral tunnel was declared in the agreement to be a benefit to appellant in conducting its business. The tunnel, when constructed, aided appellant in draining the water from its mine, furnished it with additional facilities of ventilation, and was expected to prove beneficial to it in the transportation of its ores. To secure these supposed advantages for the more thorough development of its mine, it agreed to "advance" to respondent a

specified sum of money per foot for the construction of the lateral tunnel. Was not such a contract within the legitimate scope of its business? Is it not, at times, necessary for mining corporations to enter into contracts of a similar character? It is unnecessary to enter into a detailed statement as to the method of working mines and conducting the business of extracting ores from the lower levels of the Comstock lode. The difficulties under which the mining companies labor, in getting rid of the water, are well understood. Without a concert of action between the different mining companies, or the advantages to be obtained from a tunnel company draining the ground, it would often be extremely difficult, if not impossible, to accomplish this purpose. Under such a condition, would not one mining company have the right, under its charter, to advance money to another for aiding it in pumping out the water from its mine? The contract is not one, as claimed by appellant, of a mining corporation agreeing to advance money, pure and simple, to a tunnel corporation solely for its use and benefit. It is a contract of a mining corporation to advance a specified sum of money, per foot, for the construction of a tunnel to drain its mine, and other purposes, as hereinafter stated, and is within the scope of its business. In making it, appellant did not exceed its chartered powers. The contract was not *ultra vires*.

The facts of this case are wholly unlike those which existed in *Davis v. Old Colony R. Co.* 131 Mass. 258, upon which appellant relies. There a railroad company, together with another corporation organized for the purpose of manufacturing and selling musical instruments, entered into an agreement to guaranty the payment of the expenses of a musical festival, to be held in the city of Boston, under the reasonable belief that the holding of the festival would be of great pecuniary benefit to the corporations by increasing their business. The court, after a careful review of numerous authorities, both in England and the United States, declared that the contract was *ultra vires*, and that no action could be maintained upon it. Why? Because, to quote the language of the court: "The holding of a world's peace jubilee and international musical festival is an enterprise wholly outside the objects for which a railroad corporation is established; and a contract to pay, or to guaranty the payment of, the expenses of such an enterprise, is neither a necessary nor an appropriate means of carrying on the business of the railroad corporation; is an application of its funds to an object unauthorized and impliedly prohibited by its charter; and is beyond its corporate powers. Such a contract cannot be held to bind the corporation by reason of the supposed benefit which it may derive from an increase of passengers over its road, upon any ground that would not hold it equally bound by a contract to partake in or guaranty the success of any enterprise that might attract population or travel to any city or town upon or near its line." In the case of the other corporation the same reason existed.

"The power to manufacture and sell goods of a particular description does not include the power to partake in or to guaranty the profits of an enterprise that may be expected to increase the use of or the demand for such goods."

It is apparent that the doctrines announced in that decision are not applicable to the facts of this case. There the benefits to the corporation were wholly disconnected, remote, and foreign to the business in which they were engaged. Here the benefit to appellant is direct. The construction of the lateral tunnel, if not absolutely necessary, was certainly a convenient and appropriate means to drain its mine, and enable it to properly conduct and carry on its legitimate business of mining in a systematic and scientific manner.

In Brice's Treatise on the Doctrine of Ultra Vires, it is said that "corporations may transact, in addition to their main undertaking, all such subordinate and connected matters as are, if not essential, at least very convenient to the due prosecution of the former," and that, under many circumstances, "they are in a manner necessitated to engage in business which is not within the mere letter of their constitution." Green's Brice, Ultra Vires, 89.

In applying these principles, the courts have held that a corporation, created for the purpose of mining and transportation of coal, had the power to purchase and use a steam-boat for the purpose of conveying its coal to market, (*Callaway M. & M. Co. v. Clark*, 32 Mo. 305;) that a corporation, created for the purpose of raising and smelting lead ore, had power to purchase smelting works, and assume a contract entered into by their vendors providing means for the transportation of their ores, when smelted, to market, (*Moss v. Averell*, 10 N. Y. 455;) that a corporation created for the purpose of carrying on an iron furnace is authorized to carry on a supply store in connection with that business, (*Searight v. Payne*, 6 Lea, 283;) that railroad corporations have the right to own and control steam-boats for the purpose of transporting their freight and passengers across navigable waters on the line of their routes, and also at the end of their roads separating them from the substantial *termini* of their routes, (*Wheeler v. San Francisco & A. R. Co.* 31 Cal. 65;) that where power is given to a railroad corporation to transport persons and property beyond the *termini* of its road, it has authority to purchase and use a steam-boat for that purpose, (*Shawmut Bank v. Plattsburgh & M. R. Co.* 31 Vt. 496;) that a railroad corporation, authorized to carry passengers and transport freight beyond its own lines, and to run steam-boats for that purpose, may hire, either by the trip or by the season, steam-boats belonging to others, or employ such steam-boats to carry passengers and freight in connection with its own railroad and business, and guaranty to the proprietors that their gross earnings for the season shall not fall below a certain sum. *Green Bay & M. R. Co. v. Union Steam-boat Co.* 107 U. S. 101; S. C. 2 Sup. Ct. Rep. 221.

These and numerous other kindred cases proceed upon the theory that if the contract of the corporation is reasonably confined and connected with the business in which the corporation is engaged it comes within its implied or incidental powers. "Corporations may so far develop and extend their operations as to engage in matters not primarily contemplated by their founders, provided these matters come fairly within their scope, and provided, also, that in so developing and extending their undertaking, they employ direct and not indirect means." Green's Brice, *Ultra Vires*, 90.

It will be observed, upon an examination of the cases, that the learned justice who delivered the opinion of the court in *Davis v. Old Colony R. Co.* also rendered the decision of the court in *Green Bay & M. R. Co. v. Union Steam-boat Co.* In the latter case he said:

"The general doctrine upon this subject is now well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

5. It was averred in the answer that the cost of the construction of the tunnel through defendant's mining ground should not have been, and was not, greater than \$40 per foot. At the trial, testimony was given to the effect that a similar tunnel was constructed at a cost of \$28 per foot; and it is claimed that the court erred in allowing \$70 per foot. This position is clearly untenable. The contract was that appellant should advance and pay \$70 for each foot of the tunnel. It could not avoid this contract by showing that the tunnel could have been, or was, constructed for a less sum per foot. The question as to its actual cost was wholly immaterial. The parties fixed the price by their contract, and, in the absence of any fraud, undue advantage, or failure to comply with the covenants as to its construction, are bound by the terms of the contract. We do not believe that appellant would be willing to admit that if the tunnel had actually cost \$100 per foot to construct it, that respondent could have recovered that amount under any of the covenants in the contract. It was not entitled to recover any more, and was not bound to take any less, than was "nominated in the bond."

6. Objection is made to the amount of interest allowed. It was admitted at the trial that the legal rate of interest in California, where the contract was executed, was 7 per cent. per annum, and the question is presented whether the court erred in allowing interest at the rate of 10 per cent. per annum, that being the legal rate of interest allowed by the laws of this state. The ruling of the district court was correct. The work under the contract was done and performed within this state. In a case like this, where the interest is given as damages for a breach of a contract, the rate of interest allowed by

the laws of the state where the contract is to be performed should govern. 2 Pars. Cont. 585; *Goddard v. Foster*, 17 Wall. 143. "It is a general rule that where the contract stipulates for interest, it is payable agreeable to the law of the place where the contract is made; but if the contract is made with reference to the laws of another state or county, and is to be performed there, the interest is to be calculated according to the laws of the place where the contract is to be performed or the money paid. The place of performance is chiefly regarded; it locates the contract; the parties are presumed to have the laws of that place in view in making their contract." 1 Suth. Dam. 631.

The judgment of the district court is affirmed.

(19 Nev. 133)

MILIANI v. TOGNINI and others.

Filed June 13, 1885.

CONTRACT—RIGHT OF ACTION—EXCLUSIVE BENEFICIAL INTEREST.

A plaintiff may maintain an action on a simple contract, to which he was not a party, upon which he was not consulted, and to which he did not assent, when it contains a provision for his benefit

Appeal from a judgment of the Sixth judicial district court, Eureka county, entered in favor of respondent.

H. K. Mitchell, for appellants.

Baker & Wines, for respondent.

LEONARD, J. Plaintiff cut for Charles Cesa 211½ cords of wood, at an agreed price of \$1.50 per cord, amounting in all to \$317.80, and no part of said sum has been paid. There was a dispute between Cesa and defendants in relation to the wood, which was in possession of Cesa. In order to obtain possession from Cesa, defendants undertook and agreed with Cesa to pay plaintiff the amount due the latter for cutting the wood, to-wit, \$317.80, and in consideration of that agreement, and to compromise and settle the dispute before mentioned, Cesa delivered the wood to defendants. Plaintiff recovered judgment for the amount claimed. Defendants appeal from the judgment, and ask a reversal on the ground that there was no contract or privity of contract between plaintiff and defendants.

The precise question presented is this: Can a plaintiff maintain an action on a simple contract to which he is not a party, upon which he was not consulted, and to which he did not assent, when it contains a provision for his benefit? Besides the statute which provides that "every action shall be prosecuted in the name of the real party in interest," this court has held in three different cases that the beneficiary named in such a contract may maintain an action thereon in his own name. *Ruhling v. Hackett*, 1 Nev. 370; *Alcalda v. Morales*, 3 Nev. 137; *Bishop v. Stewart*, 13 Nev. 35. See, also, 2 Whart. Const. § 785, and the numerous authorities there cited; *McDowell v.*

Laev, 35 Wis. 175; *Lawrence v. Fox*, 20 N. Y. 268; *Hendrick v. Lindsay*, 93 U. S. 143; *Dingeldein v. Railroad Co.* 37 N. Y. 577.

In consideration of a delivery of the wood by Cesa to them, defendants agreed to pay plaintiff Cesa's indebtedness. In this promise the exclusive beneficial interest is in plaintiff.

Judgment affirmed.

(19 Nev. 135)

STATE v. SLINGERLAND.

Filed June 15, 1885.

1. **CRIMINAL LAW—LARCENY—TAKING WITHOUT INTENT TO HOLD—DEPRIVATION.**
The crime of larceny is established by proof that the defendant, in taking the property, intended to deprive the owner of the enjoyment of its possession, although the intention did not include the possession of the property for defendant's own benefit.
2. **SAME—EVIDENCE—TESTIMONY OF ACCUSED—RULE OF CREDIBILITY.**
When in a criminal case defendant offers himself as a witness, the jury is to give to his testimony all the credit to which it is entitled; but, as bearing upon the question of credibility in this connection, the jury must consider the situation of defendant.
3. **SAME—EVIDENCE—PREVIOUS GOOD CHARACTER OF ACCUSED.**
Previous good character is not to be offered in evidence only in cases where the guilt of accused is not proved, but is to be considered as part of the testimony upon which the fact itself of guilt or innocence is to be found.

Appeal from a judgment of the Sixth judicial district court, Eureka county, convicting the defendant of grand larceny, and from an order overruling his motion for a new trial. The opinion states the facts. *Fitzgerald & Beatty*, for appellant.

The Attorney General and *H. F. Bartine*, for respondent.

LEONARD, J. Appellant was convicted of the crime of grand larceny. He appeals from the judgment, and the order overruling his motion for new trial. He was accused and found guilty of stealing two horses, two saddles, and a pair of spurs. He admitted that he took the property, and removed it about five miles away. He said his object was to put the owner to all the expense and trouble possible in order to find the property; that he had no idea of benefiting himself in any way, his only object having been to get revenge.

1. The court instructed the jury that if they believed beyond a reasonable doubt that the defendant took the property, as alleged in the indictment, with the intent to permanently deprive the owner of the property, and without an intention to return the same, it was a felonious intent and the defendant was guilty. It is claimed that this instruction is erroneous in stating that the crime of grand larceny may be committed although the taker of the property alleged to have been stolen derives no benefit, and does not intend or expect to be benefited therefrom. If one of the essential elements of larceny is an intention to profit by the conversion of the property, then the instruction under consideration was incorrect. A court cannot instruct a jury that certain facts constitute a certain offense, unless

every essential fact necessary to constitute the offense be included in the statement. *Weston v. U. S.* 5 Cranch, C. C. 494. Although the authorities upon this question are somewhat conflicting, those sustaining the instruction greatly preponderate, and in our opinion they are upheld by good sense and sound reason.

In *State v. Mills*, 12 Nev. 403, this court acknowledged the correctness of the principle that where the intent is to deprive the owner of his property, it is not essential that the taking should be with a view to pecuniary profit.

In *Dignowitty v. State*, 17 Tex. 530, the court said:

"But, to constitute the felonious intent, it is not necessary that the taking should be done *lucri causa*; taking with an intention to destroy will be sufficient to constitute the offense, if done to serve the offender, or another person, though not in a pecuniary way."

And, said the court, in *Hamilton v. State*, 35 Miss. 219:

"The rule is now well settled that it is not necessary, to constitute larceny, that the taking should be in order to convert the thing stolen to the pecuniary advantage or gain of the taker, and that it is sufficient if the taking be fraudulent, and with an intent wholly to deprive the owner of the property. *Roscoe, Cr. Ev.* 533, (2d Ed.); *Cabbage's Case*, Russ. & R. 292; *Reg v. Morfit*, Id. 307. And it is said by the commissioners of criminal law in England that 'the ulterior motive by which the taker is influenced in depriving the owner of his property altogether, whether it be to benefit himself or another, or to injure any one by the taking, is immaterial.' The rule we consider to be in accordance with the principle on which the law of larceny rests, which is to punish the thief for wrongfully and feloniously depriving the owner of his property. The reason of the law is to secure a man's property to him, and that is to be carried out, rather by punishing the thief for feloniously depriving him of it, than for wrongful gain he has made by the theft. The moral wrong is founded in the wrongful and felonious deprivation."

Sustaining the same doctrine in *Warden v. State*, 60 Miss. 640, the court said:

"It seems to meet the approval, also, of most of the modern writers on criminal law, and to be sanctioned by many cases, both English and American."

In *State v. South*, 28 N. J. Law 28, the question was whether the fraudulently depriving the owner of the temporary use of a chattel is larceny at common law; whether the felonious intent or *animus furandi* may consist with an intention to return the chattel to the owner. It was held that if the property is taken with the intention of using it temporarily only, and then returning it to the owner, it is not larceny; but if it appear that the goods were taken with the intention of permanently depriving the owner thereof, then it is larceny. And in *State v. Davis*, 38 N. J. Law, 177, the same court adhered to the doctrine announced in *South's Case*, and said:

"There has been no case decided in this state that has held that where the taker had no intention to return the goods, that the taking was merely temporary. Nor is there anything that should control the action of the jury, or the court acting as such under the statute, when they find that the party having no such intent is guilty of larceny. It would be a most dangerous doctrine to hold that a mere stranger may thus use and abuse the property of

another, and leave him the bare chance of recovering it by careful pursuit and search, without any criminal responsibility in the taker."

In *Berry v. State*, 31 Ohio St. 219, and *Com. v. Mason*, 105 Mass. 166, it was held that the wrongful taking of the property of another, without his consent, with intent to conceal it until the owner offered a reward for its return, and for the purpose of obtaining the reward, was larceny of the property taken. And see, also, *People v. Juarez*, 28 Cal. 380; *State v. Brown*, 3 Strobb. 516; *Keely v. State*, 14 Ind. 36; *Rex v. Cabbage*, Russ. & R. 292; *Rex v. Morfit*, Id. 307; note *a to Holloway's Case*, 1 Denison, Cr. Cas. 376.

Counsel for appellant places great reliance upon *State v. Hawkins*, 8 Port. (Ala.) 461, wherein it was held that taking a slave in order to set her free was not larceny; but the doctrine of that case has been repudiated by the same court in the case of *Williams v. State*, 52 Ala. 413, decided in 1875, wherein it was said:

"The second charge was also properly refused. To constitute the offense of larceny, it is not necessary the taking should have been with an intent to appropriate the goods to the use or benefit of the person taking. The criminal intent consists in the purpose to deprive the owner of his property. No benefit to the guilty agent may be sought, but only injury to the owner."

Reliance is also placed upon section 1783 of Wharton's American Criminal Law, where the author says:

"In this country there has been some reluctance to accept this supposed modification of the common-law definition of larceny, and in one or two cases it has been expressly rejected. Thus, it has been declared not to be larceny, but malicious mischief, to take the horse of another, not *lucri causa*, but in order to destroy him." Citing *State v. Council*, 1 Tenn. 305; *Com. v. Leach*, 1 Mass. 59; *People v. Smith*, 5 Cow. 258; and *State v. Wheeler*, 3 Vt. 344, as authorities for the statement.

It will be found, upon an examination of those cases, that no one of them sustains the text.

Mr. Stephen, in his General View of the Criminal Law of England, 127, says:

"It is larceny to take and carry away a personal chattel from the possession of its owner with intent to deprive him of the property."

Mr. Roscoe, in his Criminal Evidence, 621, says:

"EYRE, C. B., in the definition given by him, says, 'larceny is the wrongful taking of the goods with intent to spoil the owner of them *lucri causa*;' and Blackstone says, 'the taking must be felonious; that is, done *animo furandi*, or, as the civil law expresses it, *lucri causa*.' The point arrived at by these two expressions, *animo furandi* and *lucri causa*, the meaning of which has been much discussed, seems to be this: that the goods must be taken into the possession of the thief with the intention of depriving the owner of his property in them. * * * Property is the right to the possession, coupled with an ability to exercise that right. Bearing this in mind, we may perhaps safely define larceny as follows: the wrongful taking possession of the goods of another with intent to deprive the owner of his property in them."

And see Archb. Crim. Pr. & Pl. (Pomeroy's notes,) 1185; Barb. Crim. Law, 174; 2 Bish. Crim. Law, 848.

Against these authorities, besides *Hawkins' Case* and Wharton, above cited, we are referred to four cases, viz.: *People v. Woodward*, 31 Hun, 57; *Smith v. Schultz*, 1 Scam. 490; *Wilson v. People*, 39 N. Y. 459; and *U. S. v. Durkee*, 1 McAll. 196. In *Woodward's Case* there was an able and exhaustive dissenting opinion by one of the three justices, and no authorities are cited in support of the majority opinion except Whart. Crim. Law, § 1784, and certain cases therein referred to, which do not sustain the text. In *Smith v. Schultz* the court only says:

"Every taking of the property of another without his knowledge or consent does not amount to larceny. To make it such, the taking must be accompanied by circumstances which demonstrate a felonious intention."

But the court does not say there can be no felonious intent except there be a taking *lucri causa*. In *Holloway's Case*, PARKE, B., defined "felonious" to mean that there is no color of right or excuse for the act, and the intent must be to deprive the owner, not temporarily, but permanently, of the property. In *Wilson's Case* it was only decided that the felonious intent must exist at the time of the taking. In *Durkee's Case* the court instructed the jury as follows

"(1) That if you believe, from the evidence, that the prisoner took and carried away the arms with the intent to appropriate them, or any portion of them, to his own use, or permanently deprive the owner of the same, then he is guilty. (2) But if you shall believe that he did not take the arms for the purpose of appropriating them, or any part thereof, to his own use, and only for the purpose of preventing their being used on himself or his associates, then the prisoner is not guilty."

There is nothing in the instructions quoted opposed to the doctrine we are endeavoring to maintain, although there is much in the address to the jury which does not accord with our ideas of the law. To constitute larceny the taking must be felonious, and it is so when the intent is to permanently deprive the owner of his property against his will. The court did not err in giving the fourth instruction.

2. Objection is made to the third instruction, which is substantially the same as was given in *Hing's Case*, 16 Nev. 310. See, also, *People v. Cronin*, 34 Cal. 203, and *People v. Morrow*, 60 Cal. 147. When a defendant in a criminal case offers himself as a witness in his own behalf, it is the duty of the jury to give to his evidence all the credit to which it is entitled; but in ascertaining the extent of its credibility, it is proper and necessary to consider the situation in which he is placed. A person accused of a crime may speak the truth, and it is for the jury to say, in view of all the facts, whether or not he has done so, in whole or in part. They should give proper weight and effect to all of his evidence, if they are convinced of its truth, or so much thereof as, in their best judgment, is entitled to credit. Such, we think, is the natural construction to be placed upon the instruction under consideration.

3. The second instruction was correct. *People v. Cronin*, 34 Cal. 191; *State v. Nelson*, 11 Nev. 341.

4. The first instruction given on behalf of the state is as follows:

"The court instructs the jury that the good character of the defendant can only be taken into consideration when the jury have a reasonable doubt as to whether the defendant is the person who committed the offense with which he is charged; and if you believe from the evidence that the defendant is guilty, then if the defendant has proved a previous good character, such good character would be of no avail to him, and would not authorize an acquittal."

The first part of this instruction was copied from that given in *People v. Gleason*, 1 Nev. 176, and in that case upheld by this court. The last portion was taken from the court's instruction in *Levigne's Case*, 17 Nev. 445, given in connection with two other instructions requested by the defendant. In that case we said:

"By the three instructions under consideration the jury were charged to consider all the testimony admitted in the case, including that in relation to previous good character, and if, from the whole, they believed the defendant guilty, then they should not acquit him, although he had borne a good character previously."

Such we declared was the true rule. It is consonant with reason, and upheld by the latest and best authorities.

The instruction given and upheld in *Gleason's Case* we do not like; and we did not say that the court's instruction in *Levigne's Case* would have been correct by itself alone. We only declared it correct as it was given, in connection with the two requested by defendant. We do not like the first instruction given in this case. All in all, it conveys to our minds the idea that evidence of the defendant's good character could not be considered, unless, from the other evidence admitted, the jury had a reasonable doubt of the defendant's guilt. Upon the question of guilt or innocence, they should have been charged to consider all the evidence in the case, including that in relation to character, and if therefrom they believed him guilty beyond a reasonable doubt, previous good character would not authorize an acquittal.

But although the instruction in question was not proper, it ought not, in this case, to reverse the judgment, because the undisputed facts, his own testimony included, made him guilty, no matter how fair a character he had previously borne. He admitted the taking, and did not claim that he intended to return the property to the owner at any time. It was not to be returned, and the owner was not to get it back, unless, after much trouble and expense, he might succeed in finding it. After the larceny was committed, he told the owner that he had taken the property, and where it could be found; but this was done in consideration of a promise not to prosecute him for taking another horse, not voluntarily. The jury must have found that appellant intended to deprive the owner permanently of the property, for they were instructed to acquit him if he took it with the in-

tent to hide the same and make trouble for the owner, and then return it, and not to derive any benefit therefrom. If appellant had taken the property just as he did for the purpose of gain to himself, rather than out of revenge, it is conceded that he would have been guilty of the offense charged. In that case, no amount of testimony establishing former good character could have induced a doubt of guilt. In view of our conclusion upon the fourth instruction, the same is true now.

Judgment and order appealed from affirmed.

SUPREME COURT OF COLORADO.

18 Colo. 339)

KAYSER v. MANGHAM.

Filed May 12, 1885.

CONSTRUCTIVE TRUST—PURCHASE OF LAND WITH PARTNERSHIP FUNDS.

The rule that the purchase, by one partner, of land with partnership funds, invests him with a constructive trust in favor of his copartner, does not apply when the purchase was made in good faith and with no fraudulent intent.

Appeal from district court, Hinsdale county. Petition for rehearing. S. C. 6 PAC. REP. 803.

J. W. Mills, L. S. Dixon, and A. L. Bushnell, for appellant.

Charles E. Gast, for appellee.

HELM, J. Where one partner, having partnership funds in his possession, to be used for partnership purposes, without the consent of his copartner, invests the same in land for himself, taking the title in his own name, the copartner may demand an interest in the realty purchased, corresponding in extent with his interest in the money paid therefor. And it is probably true that in such case a court of equity will not hesitate to recognize the resulting trust, even though the partner thus appropriating the trust fund intended to account therefor upon final settlement, and was innocent of any fraudulent purpose. The ordinary principle in equity, relating to the investment of trust funds by the trustee, is held applicable to such cases; and a copartner has the right at his election, when there are no intervening innocent purchases or incumbrances, to follow the money and reclaim his proportionate interest in the land.

It is safe to say that the foregoing general rule is now well established; it is highly beneficent and wholesome, and we make no issue with counsel concerning its existence. But in our judgment it does not cover the case at bar, and its application thereto would be unwarranted. The reasons for the foregoing rule are that the trust fund is in the hands of the trustee or partner for certain specific purposes; and when he used it without the consent of the *cestui que trust* or copartner in the purchase of realty for himself, he is guilty of a breach of trust; there is a diversion of the trust fund to a purpose not contemplated by the conditions of the trust; and so watchful is a court of equity over the acts of trustees, and so jealous is it of the interests of beneficiaries, that it often pronounces such appropriation wrongful regardless of intent. It says to the trustee or partner:

"Your motive may be pure; you may fully intend to return the money used, with a gratifying addition thereto by way of interest or otherwise; or it may be your purpose to charge yourself in a final settlement with the full amount appropriated, regardless of the outcome of the investment,—but you had no right to divert the money from the fund to which it belonged, and the purpose for which it was placed in your hands; and in so doing you were disloyal

to the obligations imposed by virtue of the position you occupy. This being true, the person upon whom you have inflicted the wrong, may elect whether he will receive repayment of the money, or whether he will follow it into the property bought and held by you."

But the foregoing circumstances do not exist in the case at bar. Mangham did not thus wrongfully divert partnership moneys in his hands. He did not take \$1,500 from the partnership treasury, and, adding \$18,500 of his own, purchase the property; neither can it be said that he accomplished this result by indirection. The \$1,500 had been used by the partnership for a partnership purpose; it had been invested in good faith, with the consent of plaintiff, for the attainment of a collateral object, directly in the line of the partnership business or adventure; it secured from the owner of the property the extension of time, for which it was paid; and, in accordance with the terms of its payment, this extension having expired, it had practically become forfeited and entirely lost to the firm; the firm itself virtually passing out of existence by reason of the failure of the partnership adventure. How can it be said that Mangham, when he bought under these circumstances, diverted the money from legitimate partnership uses. Instead of wrongfully diverting partnership moneys under the view adopted by us, he redeemed and saved to himself and copartner that which had previously been expended by the partnership and forfeited. It must be borne in mind that we have heretofore declared Mangham's conduct throughout the entire transaction, so far as the record shows, void of any appearances of actual bad faith; and the question before us is, was he, through his purchase of the mine, guilty of such a *constructive* fraud as in and of itself produced a constructive or resulting trust?

It is apparent from the foregoing that the reasons for applying the doctrine of resulting trusts to the investment by a partner, for his private advantage, of partnership funds do not exist in this case; and the reasons for the rule failing, the learned counsel who urges this rehearing with such skill will be among the first to say that the rule itself should not be applied. It might perhaps be truthfully said that Kayser's conduct, after learning of the purchase by Mangham, was such as to estop him from now claiming an interest in the mine, had he possessed the right in the first instance. Aside from the question of laches in bringing this suit, which was considered in the opinion heretofore filed, a court of equity might perhaps construe his language and acts into an election not to claim any interest in the mine. But we prefer, now as before, to rest our conclusions upon other, and in our judgment stronger, grounds.

The rehearing is denied.

(8 Colo. 342)

QUIMBY and others v. BOYD and others.

Filed May 12, 1885.

MOTION FOR REHEARING.

Facts considered, and motion denied.

Appeal from district court of El Paso county.

W. J. Sharman, for appellants.*Markham, Patterson & Thomas*, for appellees.

Petition for rehearing. See S. C. 6 PAC. REP. 462.

PER CURIAM. Upon consideration of the petition for rehearing of this cause, and the points urged in the oral arguments thereon, the court is of opinion that the application should be denied. As stated in the opinion, the only question about which we entertained any doubt was the sufficiency of the testimony to support the verdict of the jury as to the performance of the annual labor required by law, for the year 1880; and we are still of opinion, in view of the whole testimony and the repeated verdicts for the plaintiffs, that we would not be warranted in reversing the cause upon that ground. While the testimony of the plaintiffs below was mainly directed to the point that the price paid for the work performed was a reasonable price for work of that character and extent, when done on contract, yet there was some evidence tending to show its actual value, and that it came up to the legal standard.

We are still of opinion that there is no force in the objection urged against the validity of the location of the Paymaster claim.

Rehearing denied.

SUPREME COURT OF COLORADO.

(S Colo. 305)

KNOTH v. BARCLAY and others.

Filed May 12, 1885.

MOTION FOR REHEARING—PRESUMPTION OF WAIVER.

After submission of a case for judgment, an objection that might have been urged, but was not, must be considered as waived, and a rehearing will not be allowed on the strength of such objection.

Error to district court of Boulder county. On petition for rehearing. S. C. 6. PAC. REP. 924.

S. W. Dolliff and Tilford & Gilmore, for plaintiff in error.

B. L. Carr, for defendant in error.

PER CURIAM. Each and every matter presented upon this rehearing, save one, was fully and carefully examined in preparing the opinion heretofore filed. We are still satisfied with the correctness of the views therein expressed, and deem any further argument thereof unnecessary. The question which was not then considered relates to the sufficiency of the bill of exceptions. Counsel now, for the first time, urge the proposition that the bill does not "*purport* to contain all the evidence," and therefore the sufficiency of the proofs could not be inquired into. We do not feel called upon to determine whether or not the defect suggested actually exists. If counsel's idea, that the objection is well taken, be correct, in our judgment it has been waived. The cause was argued fully *upon the evidence* by both sides; the objection now urged was entirely ignored; we were induced to investigate the whole case upon the theory that the entire evidence was before us. Under these circumstances we think it is too late at this time to take advantage of the alleged defect. Such defect, if it exists, counsel had the privilege of urging or not as they chose. From their conduct we were justified in presuming that they elected to waive it.

It is the duty of counsel to present all questions upon which they rely in their briefs and arguments in the first instance; and the court in reviewing the cause does not usually go beyond the subjects to which its attention is thus invited. It would be obviously unfair to permit the presentation of such questions as the one now before us, at this stage of the proceedings. Counsel are not permitted to present part of their case at the formal submission, and the remainder upon the petition for rehearing. If they have discussed all the errors or defects upon which they rely, but after the submission some new matter or point bearing upon such errors or defects be discussed; or if it is believed that the court has overlooked something material to a correct conclusion thereon,—a petition for rehearing is in order.

The foregoing view is in accord with the general practice hitherto prevailing in this court. It is not in conflict with the declaration made

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on the subject in *Parks v. Wilcox*, 6 Colo. 600. The "new matter or point essential or pertinent to the decision" there mentioned, is something bearing upon the questions presented at the formal submission of the cause; it is not an error or defect in the proceedings below, disclosed by the record, which should have been insisted upon, but something which counsel have seen fit to ignore in the presentation of the cause upon its regular submission in this court.

While the whole matter is in the sound discretion of the court, the foregoing is the general rule. Exceptions may be made, but only for cogent reasons growing out of unusual circumstances.

The rehearing is denied.

(8 Colo. 332)

PEOPLE *ex rel.* WHITTEMORE *v.* RYALLS.

Filed May 29, 1885.

ATTORNEYS AT LAW—DISBARMENT—STATUTE OF COLORADO.

Section 74 of the General Statutes of Colorado was adopted, not for the purpose of affording a private remedy for the collection of the moneys mentioned, but to place in the hands of the supreme court of the state an additional means of purging the bar of unworthy members.

Proceeding for disbarment.

Theo. H. Thomas, Atty. Gen., and *Horace G. Benson*, for the People.

PER CURIAM. This proceeding is instituted under section 74 of the General Statutes. The substance of this statute, briefly stated, is that whenever an attorney shall receive, in his official capacity, any money or property belonging to his client, and shall, upon demand therefor and tender of fees, refuse or neglect to pay over the same, *any person interested* may apply to the supreme court for a rule requiring such attorney to show cause why his name should not be stricken from the roll of attorneys; and if at the trial the truth of the charges made be sustained, the court shall cause the name of such attorney to be stricken accordingly. After service of the rule in this case, as required by law, respondent paid the money wrongfully withheld; also the costs of this proceeding. It seems to have been understood that the proceeding would then be dismissed by relator, as respondent made no answer, took no steps to defend against the charge, and departed from the state. We decline to discharge the rule, and have heard the evidence touching the matters averred in the petition.

It seems to have been assumed in the present and several similar cases recently brought in this court that the statute mentioned was framed to aid clients in collecting moneys thus wrongfully withheld by their attorneys. Doubtless the proceeding will tend to accomplish this purpose for two reasons: *First*, an attorney must be lost to all sense of honor as well as professional pride, who would not thereby be stimulated to relieve himself from the odium attaching to his breach of trust; and, *second*, payment of the money, even though under an influence akin to coercion, would probably have some bearing

upon the decision of this court on the question of disbarment. But we do not conceive that the statute referred to was adopted for the purpose of affording an additional private remedy for the collection of the moneys mentioned. In our opinion the principal object of the legislature was to place in the hands of this court an additional means whereby the profession may be purged of unworthy members, and litigants generally be protected from impositions practiced by such persons. As supporting this view, it may be suggested that without the statute at common law the client possessed quite as effective a remedy for the wrong under consideration; he might obtain from the court a rule requiring the attorney to pay over the moneys kept back, and upon disobedience of the rule the proper practice was not to move for disbarment, but to procure an attachment for the contempt. Weeks, Attys. Law, § 97. Under this common-law proceeding, as declared by HALLETT, C. J., the "attorney so attached might purge himself by satisfying the demand; but the statute is otherwise." The learned judge further says:

"By section 7 it is provided that the judgment of the court shall stand until the court shall authorize the attorney again to subscribe the roll; and I do not perceive that he may obtain such permission by payment of the money merely." Concurring opinion *In re Browne*, 2 Colo. 558.

The evidence taken in the case before us demonstrates that respondent is guilty of the offense referred to in the statute, and charged by the petition. We think that he improperly neglected and refused to pay over the money of his client, the relator herein. Interpreting the statute as we do, it therefore becomes our duty to pronounce the judgment of disbarment.

In so far as the foregoing views may conflict with those of the majority of the court in the case mentioned, (2 Colo. 553,) that decision is modified. The rule to show cause heretofore issued herein is made absolute; and it is accordingly adjudged that the name of respondent, John V. Ryalls, be stricken from the roll of attorneys who are permitted to practice in the courts of this state.

CAMPBELL, Intervenor. etc., v. COLORADO COAL & IRON CO.

Filed June 17, 1885.

ASSIGNMENT FOR BENEFIT OF CREDITORS—WITHHOLDING OF PART OF PROPERTY OF INSOLVENT—VALIDITY OF DEED.

The primary object of the statute of Colorado relative to assignments (section 68, Gen. St.) is to secure a *pro rata* distribution of the insolvent debtor's entire estate among all the creditors; and the withholding of part of the property from the control of the assignee, and the subsequent conveyance or mortgage of the same to favored creditors, works a fraud as palpable as would a preference given and received on the eve of an assignment for the express purpose of evading the statute.

Error to superior court of Denver.

E. O. Wolcott and A. E. Pattison, for plaintiff in error.

R. D. Thompson and John M. Waldron, for defendant in error.

HELM, J. The cause at bar was tried in the superior court upon an agreed statement of facts. This statement is, in brief, as follows:

Ferdinand Jensen and William M. Bliss were engaged as partners in mercantile business at Denver, Colorado, and Deadwood, Dakota; the firm name at the former place was Jensen, Bliss & Co., at the latter it was Jensen & Bliss. At the hour of 7 o'clock, P. M., October 1, 1884, Jensen, Bliss & Co. made an assignment of certain claims, demands, notes, and accounts, aggregating in value about \$13,500, to one Metcalf, for the purpose of paying or securing a *bona fide* firm indebtedness of \$20,000. At the same time and for a like purpose Bliss also executed to Metcalf a trust deed upon certain realty, the title of which was in the former's name alone. At the hour of 9 P. M. of the said October 1st the firm executed and delivered to R. A. Campbell, as assignee, an assignment of all the partnership property "of every name and nature within the state of Colorado" for the equal benefit "of each and every of our creditors in both branches of our said business, and everywhere." Prior to this, and about September 20, 1884, the attorney of the firm was directed to draw both of the said assignments. The one to Metcalf was prepared by said attorney on said September 20th, and the other four days later, to-wit: September 24th. On the twenty-ninth day of September, without the knowledge of Metcalf, an entry was made upon the books of the firm of the transfer to him of the choses in action mentioned in the written assignment made for his benefit. At the time of the assignment to him Metcalf knew that the other assignment aforesaid was about to be made; but the assignee, Campbell, was ignorant, when he accepted the trust, of the Metcalf transaction.

On the second and fourth days of October, 1884, the firm of Jensen & Bliss executed and delivered mortgages to certain of their Deadwood creditors, upon their Deadwood property. Though the nature of this property is not specifically stated in the record, yet we are sufficiently advised to say that it was all, or nearly all, personalty. During all of the preceding transactions both nominal firms were insolvent. November 8th following, plaintiff, the Colorado Coal & Iron Company, being a *bona fide* creditor of Jensen, Bliss & Co., brought an action against the firm for the amount of its claim, and caused a writ of attachment to be levied upon the property in the hands of Campbell as assignee. The latter intervened in this attachment proceeding, claiming the property by virtue of the assignment aforesaid.

Judgment was rendered against the intervenor, and in favor of plaintiff, whereupon the former sued out this writ of error.

It is hardly necessary to state that the question now presented for determination relates to the validity, under all the foregoing circumstances, of the assignment to Campbell. Since the persons constituting both firms were the same, and they were engaged in carrying on the same business in both places, there was in law but a single partnership. The fact that there were two partnership names is of no importance, and "the assets of both nominal firms are equally applicable to the payment of all the creditors." *In re Williams*, 3 Woods, (C. C.) 493, and authorities there cited. We shall, therefore, in the discussion of this case, adopt the theory that there was but a single partnership which was engaged in business at the two places mentioned; that the Colorado creditors and the Dakota creditors were equally interested in the assets, whether in Denver or Deadwood, and are entitled to equal protection under the law.

It may be considered a settled doctrine that a voluntary assignment which is valid in the state where the owner resides, will be held to pass personal property included, the *situs* of which is in another state. It is said that, while "an involuntary transfer of movable property abroad by process at home does not divest the title in prejudice of creditors domiciled at the place of the actual *situs*, a voluntary transfer by the act of the owner divests it everywhere." This is in perfect harmony with the principle that while "the *lex loci contractus* determines the validity of the contract, the *lex fori* controls the remedy." *Speed v. May*, 17 Pa. St. 91, citing *Milne v. Moreton*, 6 Bin. 360, and other cases. See, also, *Dehon v. Foster*, 4 Allen, 545, and cases cited.

We are not here concerned with the qualifications of the foregoing doctrine, such as that a contract made in one state, and relating to the transfer of personal property, shall not be permitted to injure the citizens of another state whose laws are invoked to carry it into effect; for, as we shall hereafter see, the injury complained of in this case is visited upon the citizens of the state where the contract is made, and it is only claimed that they should have been placed upon an equality with those of a neighboring territory wherein part of the property is situated.

If the foregoing propositions of law are correct, it follows that Jensen & Bliss might have included in their assignment to Campbell their Dakota as well as their Colorado property; and we shall presently see that under our statute it was their duty to do so. They, however, not only gave preference to Metcalf, but also made a partial assignment of their property, viz., the part thereof in Colorado, for the benefit of their Dakota as well as their Colorado creditors. Not only this, but immediately thereafter they show unreasonable favoritism by further securing their Dakota creditors with mortgages upon their Deadwood property. Bearing these facts in mind, let us briefly examine the law governing assignments of this character in Colorado.

Section 68 of the General Statutes reads as follows:

"Whenever any person or corporation shall hereafter make an assignment of his or its estate for the benefit of creditors, the assignee named in the deed of assignment, elected or appointed, shall be required to pay in full, from the proceeds of the estate, all moneys *bona fide* due to the servants, laborers, and employes of such assignor for their wages accruing during the six months next preceding the date of such assignment, but to exceed in no event the sum of fifty dollars to any one person then remaining unpaid. All the residue of the proceeds of such estate shall be distributed ratably among all other creditors, and any preference of one creditor over another, except as above allowed, shall be entirely null and void, anything in the deed of assignment to the contrary notwithstanding."

We do not understand that this statute prevents a debtor in failing circumstances from preferring one *bona fide* creditor over another by securing or paying his claim, provided the security be given or pay-

ment made and accepted in good faith. But when such preference is given by an insolvent debtor at or about the time of an attempted assignment for the benefit of creditors, and the circumstances palpably show an effort on the part of assignor and assignee to evade the statute, it cannot be said that the requisite good faith characterizes the transaction. It is then an attempt to accomplish indirectly that which cannot be done directly; for if the preference were stated in the deed of assignment it would be ignored. While the assignment itself would be upheld, the assignee having control thereof would be required to distribute the proceeds of the trust-estate ratably as though no such preference had been declared.

It is also clear that an assignment for the benefit of creditors generally must, under the statute, convey all of the insolvent debtor's property not exempt from execution. It would be a gross violation of the first principle of statutory construction for us to hold that such an assignment might include a part only of the insolvent debtor's estate or assets, the balance thereof remaining to be distributed as he deems best among a few favored creditors. The word "estate" used in the statute most assuredly means all of the debtor's property which is not exempt from execution.

Does the omission to include the entire partnership assets in this assignment invalidate the conveyance as to an attaching creditor; or does the Metcalf transaction produce this effect? Could we hold that the deed of assignment in law gave Campbell, the assignee, control of the partnership property, notwithstanding the limitation therein stated, and notwithstanding the conveyance to Metcalf, this question would be cheerfully answered in the negative; for we would thus be effectuating the maxim to which the statute was intended to give vitality, that among creditors, under such circumstances, equality is equity. But in this respect the instrument must speak for itself; the assignee can take title to only the property conveyed thereby. We cannot extend the contract so as to embrace assets, real or personal, not covered by the language used, and evidently not intended by the parties thereto to be affected by the transaction. This rule of interpretation applies as well to assignments made since the statute was adopted as to those executed and delivered prior thereto.

There is no possible legal construction whereby we can say that the Dakota property was included. It is carefully excluded; and showing that its omission was not a mistake is the fact that it was almost immediately mortgaged to the Dakota creditors. Thus it appears that, however we might hold as to the choses in action transferred to Metcalf, \$30,000 worth of the partnership assets were reserved from the control of the assignee. This, in our judgment, is fatal to the assignment. It must fall at the suit of plaintiff, because in violation of the statutory requirements above mentioned. The primary object of the statute, as already declared, is to secure a *pro rata* distribution of the insolvent debtor's entire estate among all the creditors; and when

property is withheld from the control of the assignee, and afterwards conveyed or mortgaged to favored creditors, the fraud is as palpable as when the preference is given and received on the eve of an assignment, with intent and for the express purpose of evading the statute. If the assignment must fall in the latter case it should be held void in the former also.

The other branch of the foregoing interrogatory, viz., the effect, upon the assignment to Campbell, of the Metcalf transaction, is not so easily answered. A fair discussion of it would compel us to determine at least two questions as to which the courts are not in harmony. In view of the fact, however, that the foregoing conclusion is decisive of the proceedings in this court, it is not necessary that we should further prolong this opinion. We shall therefore presume counsel's indulgence in declining to do so.

The judgment is affirmed.

POMEROY v. ROCKY MOUNTAIN INS. CO.

Filed June 17, 1885.

LIFE INSURANCE—RENEWAL OF POLICY AFTER BREACH OF CONDITION—FRAUD OF AGENT—COMPANY, HOW AFFECTED.

Wrong conduct on the part of an insurance agent, or collusion between him and the assignee of a policy, whereby the policy, after having become void by breach of a condition, is renewed, notwithstanding the breach, does not present such a case as estops the insurance company from alleging the breach as a ground for refusing to pay the policy.

Error to district court of Arapahoe county.

Stuart Bros., for plaintiff in error.

W. W. Cover and *B. T. Harrington*, for defendant in error.

HELM, J. A judgment was rendered in the court below against plaintiff upon demurrer to his amended complaint, to reverse which this writ of error was sued out. All of the material facts well pleaded in the complaint are therefore admitted.

One of the several matters argued is, in our judgment, decisive of the case, and we shall therefore consider no others. The complaint avers, *inter alia*, the following facts, viz.: That a condition in the certificate of insurance or policy was that if the party insured should become so far intemperate as to impair his health or induce *delirium tremens*, the certificate should be void; that at the time of the renewal of the policy the assured was intemperate, and that his intemperance was such as to impair his health; but that Johnson, the agent who renewed the policy, was familiar with the habits of the deceased, and then had full knowledge of the latter's intemperance and the impaired health resulting therefrom. The complaint also avers that the only ground of refusal to pay the amount of the policy was that "the deceased either died from *delirium tremens* or became so intemperate as to impair his health;" likewise that deceased did not die of *delirium tremens*.

The question presented by these averments and the demurrer thereto is this: Was the condition in the certificate regarding intemperance waived; or, putting it in another way, did the knowledge of Johnson and his acts in the premises operate to estop the company from relying upon the violation of this condition as a defense? We are disposed to treat the revival or renewal of the certificate after its forfeiture for non-payment of dues as similar, so far as the above question is concerned, to the making of the contract of insurance in the first instance; hence, we are not to consider the waiver of a cause of forfeiture occurring after the contract is made, but the waiver of a material condition therein at its inception. This distinction should be borne in mind, because there is a marked difference in law between the act of the insurer in receiving premiums, assessments, or dues, with knowledge of the subsequent violation of a material condition, which was originally placed in the policy solely for his benefit, and the waiving of such condition at the inception of the contract; it (the condition) nevertheless being inserted into the writing which is executed and accepted by the parties.

The plaintiff in this case, who is the assignee of the policy, and who procured the renewal, must be presumed, notwithstanding his disclaimer on the subject, to have known the contents thereof when it was revived or renewed. No fraud or deception being practiced upon him, the law will not permit him to say that he was ignorant of the conditions contained in the contract. We must assume, also, that he, as well as the agent, Johnson, was aware of the assured's impaired physical condition when the contract was renewed, there being no averment in the complaint to the contrary.

It is therefore true that plaintiff paid the premium for the revival of the policy, and took the assignment thereof, with knowledge of the condition mentioned, and also with knowledge of the fact that the cause of forfeiture thereunder already existed, and went into the transaction with his eyes open. He was not deceived or misled as to the condition in question; nothing is disclosed by the complaint to show that it was alluded to or discussed by himself or the agent. He now insists that, solely by reason of Johnson's knowledge of the assured's intemperance and impaired health, his principal is estopped from asserting the forfeiture.

It is clear that a gross fraud was practiced upon the company. This is one of the leading grounds of forfeiture. It is a matter of vital importance by way of protection to the insurer. This condition is of such a nature that the presumption of waiver should rest upon strong and unusual circumstances. We would about as soon expect a fire insurance company to waive the condition rendering a policy void if the fire occasioning the loss be voluntarily set by the owner of the property for the purpose of obtaining the amount of the risk. Plaintiff, as a man of ordinary good sense, must have known that no renewal of the policy would have been permitted had the company

been actually advised of the existing circumstances. If he was acting in perfect good faith, he should at least have insisted on striking this condition from the contract. The situation here disclosed is wholly unlike that existing under certain of the decisions cited by counsel for plaintiff in error, where the assured or the plaintiff was the innocent victim of deception practiced by avaricious and unscrupulous agents.

As suggested already, a fraud was practiced, or attempted to be practiced, upon the company by its agent. If plaintiff and the agent actually conspired together to consummate this fraud, of course the former cannot recover. If the agent alone possessed the wrongful intent,—and such probably was the fact,—plaintiff, through his own negligence, became the instrument by which the fraudulent contract was made. It would seem that in procuring the renewal plaintiff must have relied upon one of two contingencies happening in case of the assured's decease: either that the company would not discover the fraud of its agent, or that the law would create an estoppel by reason of the knowledge of Johnson against its relying upon this defense. In either view he can hardly be regarded as entirely innocent.

Under all the circumstances here presented, we do not deem this an appropriate case in which to apply the doctrine of estoppel or waiver through the knowledge and conduct of agents, recognized by the supreme court of the United States, and by many of the state courts of last resort. The general rule is that parties must be held to the solemn declarations contained in their written contracts; that parol proof of matters occurring prior to or at the time of executing such contracts, but embodied therein, will not be admitted to contradict or vary the terms thereof. We are aware that to this rule there *seem* to be exceptions, and that these so-called exceptions are sometimes recognized in insurance cases. But it is said that even then the courts do "not admit oral testimony to vary or contradict that which is in writing; that the reception of this kind of proof rests upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances as estopped that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it." Mr. Justice MILLER in *Insurance Co. v. Wilkinson*, 13 Wall. 222.

In the case alluded to, the discussion arose through a false answer to an interrogatory in the application. A question calling for the cause of the mother's death, and her age at the time, was answered by both the assured and her husband to the effect that they had no knowledge whatever on the subject; but the agent, after interviewing of by-standers, wrote the answer that she died of a fever at the age of 40 years. Upon the trial of the suit brought to recover the amount

of the policy, it was proven that the mother died at the age of 23 years. There was also evidence that her death resulted from consumption, but the jury did not so find. The court sustained the recovery. As to what would have been held had it appeared that the assured and her husband, for whose benefit the policy issued, then knew the cause of the mother's death and her age at the time, we are, of course, not advised. When the application, which is a part of the contract as much as the policy itself, was signed, the applicant was not aware that the answer was false. Having heard the statements of the party questioned by the agent, he probably believed them to be true. Besides, in writing down this answer, the agent acted entirely upon his own responsibility. It is a very different case even from that where the applicant himself *innocently* gives a *false* answer to a material question, upon which answer the agent and the company rely.

By analyzing the extract above given from the decision in 13 Wall. it will be seen that there must be inequitable circumstances such as substantially render the applicant himself the innocent victim of imposition or fraud. What else could prevent the use of the instrument against him or estop the other side from relying upon its contents?

We have examined the decisions cited, and diligently searched for others, but have found none which rest upon facts similar to those now before us. So far as we have discovered, the doctrine of adjudicated cases would fairly warrant us in sustaining the view that a waiver of the condition under consideration took place, or that an estoppel to the company's reliance upon it can be held to exist. It has been unnecessary for us to discuss generally the doctrine of estoppel or waiver through the acts of the officers or agents of insurance companies. Neither have we deemed it important to consider the difference, in this respect, held by some courts to exist between the "old line," or stock insurance corporation, and the mutual association or company, to the latter of which classes defendant belongs. If we were to accept the view of those courts which hold to mutual companies to the highest degree of responsibility for the conduct of their officers or agents, still we could not sustain plaintiff's position. For, as already shown, he is not before us in the attitude of one who, without fault on his part, is the innocent victim of imposition or misrepresentation practiced by an unprincipled agent.

The judgment is affirmed.

(8 Colo. 335)

McCoy v. Wilson.

Filed June 12, 1885.

INVALID EXECUTION—EFFECT OF ACQUIESCENCE OF JUDGMENT DEBTOR—SUBSEQUENT ACTION FOR DAMAGES—MEASURE OF DAMAGES.

An invalid execution being acquiesced in by the judgment debtor, the latter, in a subsequent action to recover damages for the unlawful taking and selling of his property, can recover only the difference between the sum at which said property was sold and its actual value at the time.

Appeal from district court, Clear Creek county.

Wells, Macon & McNeal and Morrison & Fillins, for appellant.

L. C. Rockwell, W. T. Hughes, and M. J. Briggs, for appellee.

BECK, C. J. The appellant, McCoy, was judge of the county court of Clear Creek county in 1878, and also acted as clerk of said court. In September of that year, in an action pending in his court, wherein one Hawthorne was plaintiff, and the appellee, Henry Wilson, and his brother, David R. Wilson, were defendants, a joint money judgment was entered against said defendants. David R. Wilson prayed and perfected an appeal to the supreme court, but the appellee, Henry, took no steps to reverse or avoid the judgment. While the appeal was pending and undetermined, the said McCoy issued an execution upon the judgment against the property of Henry Wilson and delivered it to the sheriff of said county to execute, who levied the same upon and sold the undivided half interest of said Henry in a planing-machine and steam-boiler. The entire property was owned jointly by the Wilson brothers, and used by them in their business. David R. Wilson procured one Thompson to purchase the property at the sheriff's sale, loaning him a portion of the purchase money, and promising him to take the property off his hands, and pay him interest on the investment until he did so. The property was never removed from the planing-mill, nor does it appear that the business was in any manner interrupted by the proceedings now complained of. David R. Wilson procured a conveyance to himself from Thompson, and, according to his testimony, his brother, Henry, now pays him, as owner of the entire title, the sum of \$25 per month as rent for the use of the half interest which Henry formerly owned. The money realized at the sheriff's sale was applied upon the judgment, leaving only a small portion thereof unsatisfied. No further steps appear to have been taken in the appeal proceeding, and the validity of the Hawthorne judgment would seem to have been conceded by the Wilson brothers by their course in this affair.

In regard to the act of McCoy there certainly was no authority of law for the issue of the execution while the appeal was pending, and had they chosen to do so, both defendants might have treated the proceedings subsequent to judgment as utterly void. The appeal by David stayed all proceedings on the judgment, under section 356 of the Code of 1877 then in force. The brother, however, chose to adopt a wholly different course. David procured a conveyance from Thompson, and thereupon Henry acknowledged him to be owner of the full title, by paying him a monthly sum for the use of the half interest formerly owned by him. Henry brought this suit to recover from the judge, McCoy, and the sheriff, Watts, damages for the taking and selling his property. He dismissed the action as to the sheriff, and recovered a judgment against McCoy for the full value of his interest in the property. This is the judgment we are asked to review.

The principal error relied on was giving to the jury the following instruction for the plaintiff, exception to which was duly reserved:

"Whoever issued the execution is liable to Henry Wilson for the value of his property, with ten per cent. interest from December 18, 1878, the date of the levy, to the present time, unless, from the evidence, you believe that Henry Wilson was the real purchaser at the sale. And if you believe that he was the real purchaser, through Thompson, at the sale, then and in that case Wilson is only entitled to recover the amount of the bid at the sale, which is shown to have been \$425, with interest as above stated."

We are of opinion the above instruction does not lay down the correct rule of damages upon either hypothesis covered by it.

So far as the Hawthorne judgment is concerned it must be regarded in this case as a valid judgment. No proof was offered showing any reversal or modification of it. True, Henry Wilson interposed a replication to the answer of the sheriff, to the effect that he was never served with process, and neither appeared nor authorized any appearance for him, but offered no proof in support of such allegations, and, as we have seen, its validity was tacitly admitted after the issuing of the execution, by both of the Wilsons; one by having the property bid in for him, and the other, Henry, by ratifying the sale and receiving the benefit of its proceeds. He stands before us as acquiescing in all proceedings, regular and irregular, until the proceeds of the irregular sale were applied upon his indebtedness to Hawthorne, when he brought this suit for the value of his whole interest in the property sold, and recovered a judgment therefor, including interest thereon from time of the levy. He testified that the whole property was worth \$1,500, and his judgment against McCoy was \$900. This was more than he was legally entitled to under the circumstances.

While the issuing of the execution was a void act and rendered McCoy liable in trespass, Henry Wilson having elected to ratify the execution sale, as he must be held to have done by his conduct, and having received the benefit of the money realized by the sale, he is only entitled to recover the difference between the real value of his property and the amount for which it was sold upon execution, no special damages having been proven. He cannot accept the benefits realized by the sale, and recover a judgment also for the full value of the property sold. This is precisely the effect of the present judgment. The plaintiff made no effort to quash the execution, to restrain or set aside the sale, or to recover the property itself. Having apparently acquiesced throughout, his only loss, as shown by the record, is that accruing by reason of the property having been sold below its value. His own estimate of the value of his property was \$750; it sold for \$425. The difference between the sums, with legal interest, would be the highest sum to which he would be entitled under the proof.

On the part of McCoy there was an effort to prove that Henry Wilson was the real purchaser at the sheriff's sale. The proof does not sustain this charge, but if it should be sustained upon another trial, the plaintiff would then only be entitled to recover nominal damages, together with such special damages as he might prove.

It is argued, on part of the appellee, that none of the testimony above stated should be considered applicable to the case of McCoy, since he filed no plea of justification. In answer to this we have only to remark that the trial below was a joint trial as to both defendants, McCoy and Watts, and no objection was made on the trial, or exception taken, concerning the point now raised; also that after the testimony was in upon both sides, the suit was dismissed as to Watts, and the cause there submitted to the jury as to McCoy upon the entire testimony. No motion was made to strike out or exclude any of the evidence, and no instruction was asked to disregard any testimony that had been introduced. It is presumed that objectionable testimony was assented to if no objection was offered to it on the trial. It is a general rule that the supreme court will not review any questions except such as appear to have been raised in the court below; and this rule applies with peculiar propriety to questions of variance, which, if raised in the trial court, can generally be removed either by further proof or by amendment. Parties are not entitled to object in an appellate court, for the first time, that a defense relied upon was not available. Wells, Law & Fact, §§ 685-684, and authorities cited. The judgment is reversed, and cause remanded.

(8 Colo. 432)

PEOPLE *ex rel.* THOMAS, Atty. Gen., v. GODDARD.

Filed June 17, 1885.

STATUTE—COLORADO—QUALIFICATION OF ELECTORS—ACT OF MARCH 8, 1877—CONSTITUTIONALITY.

The qualification for elective officers is not so foreign to the title of the act of March 8, 1877, or so foreign to the ostensible purpose of that statute, as to make it obnoxious to the constitution of Colorado.

Quo warranto.

Theo. H. Thomas, Atty. Gen., Luther S. Dixon, and Thornton H. Thomas, for the People.

Chas. H. Thomas, Julius B. Bissell, Joseph W. Taylor, Clinton Reed, Wm. Kellogg, and C. I. Thomson, for respondent.

BECK, C. J. The information filed by the attorney general charges that the respondent, while a candidate for the office of judge of the Fifth judicial district, entered into seven corrupt contracts with as many different electors of said district, and that all of said contracts were made and entered into by the respondent for the purpose of securing his election to said office. It is charged that the respondent contracted separately with all these several individuals to the effect that, in the event of his election, he would appoint each one of them to the office of clerk of the district court of Lake county in said district, in consideration that each one of them should use all his influence and expend large sums of money in inducing and influencing electors to vote for him; and that, in pursuance of said contracts,

said persons expended divers sums of money in influencing a large part of the electors of said judicial district to vote for the respondent for said office. It is further charged that, upon the making of said contracts, and each and every one of them, the respondent immediately became a disqualified and disabled person, in law, to have, occupy, or enjoy said office.

The truth of these several charges is admitted by the respondent's demurrer to the information. It only remains for us, therefore, to determine whether the misconduct charged in procuring the office disqualified the respondent to hold and administer the same after his election. It must be apparent to every citizen that if such disgraceful conduct as is alleged in this information does not, *ipso facto*, disqualify one from administering an office procured by the use of such means the law is defective in this particular.

We desire in the first place to compliment the counsel engaged in the presentation of this case to the court for the able manner in which they have discussed the several questions arising upon the demurrer. The arguments, both on part of the people and the respondent, displayed learning and research, and they very materially aided the court in its investigation of the subject.

We have made a careful examination of the various cases cited, so far as the books were accessible, and we are free to say that but for the existence of the statute, referred to in the oral argument, but not discussed in the briefs, the theory of the prosecution could and would be sustained. But conceding that the statute of 5 & 6, Edw. VI. c. 16, was adopted by the territorial legislature in 1861, and that it was continued in force by section 1 of the schedule to the state constitution, and that the effect of this statute is to disqualify a person from holding an office who has resorted to corrupt means to obtain it, yet we are reluctantly forced to the conclusion that the first state legislature repealed the statute, so far as the present case is concerned. That body passed an act entitled "An act regulating elections and repealing all territorial acts upon the subject." It was approved March 8, 1877. Section 4 of this act provides as follows: "Every qualified elector shall be eligible to hold any office for which he is an elector, except as otherwise provided by the constitution." The constitution enjoins upon the legislative assembly the duty of passing laws to preserve the purity of the ballot, but that instrument does not make the specific misconduct charged in this information a disqualification to hold office.

We have, then, an old English statute, which, if in force as to the case presented, would authorize a judgment of ouster upon the facts stated in this information; but we have also a state statute passed since the adoption of the former, the effect of which is to declare the respondent duly eligible, though guilty of the acts charged, such acts constituting a misdemeanor only, which does not disqualify him as an elector. We refer to section 1227 of the General Statutes, which

operates to repeal section 875 thereof in this particular. Section 4 of the act of 1877 is irreconcilably inconsistent with the English statute in the particular mentioned; the consequence is that the later act must prevail. We know of no rule of construction applicable to the case which will avoid this result.

The general rule that a general statute does not repeal a special or particular statute does not apply, for the reason that the statute of Edward VI. cannot be said to be either a special or a particular statute. Had it been of such a nature it would never have been brought to the shores of this continent by the early colonists from England, nor would it, as a part of the common law, ever have become the rule of decision in any part of this country. It was only the public laws of the mother country, and those of a general nature, which found their way into the jurisprudence of this country. This point was made by the relator upon the argument, and authorities were cited to show that the statute of Edward VI. was regarded as a public law in England; that the judges *ex officio* took notice of it; and because it was a general law, and not local or special, it, with other general laws of that country, became the rule of decision on this side of the Atlantic prior to its adoption by state conventions, and prior to its enactment by state legislatures. It was this characteristic that brought it within the adopting act of the Colorado legislature of 1861, which declared that the common law of England, so far as the same was applicable and of a general nature, and all acts of the British parliament made in aid of or to supply the defects of the common law prior to the fourth year of James I., (with certain exceptions,) and which were of a general nature, and not local to that kingdom, should be the rule of decision here, and should be considered of full force until repealed by legislative authority. It is such an act as is clearly susceptible of repeal by implication. The inconsistency between its provisions and those of section 4 of the act regulating elections is patent, and, if the latter section is valid, it undoubtedly works a repeal of the English statute, so far as the facts of this case are concerned.

The only source of doubt as to the validity of the section in question is whether it is germane to the title of the act in which it appears. The question is a close one and not free from doubt. Our constitution prohibits the passage of bills containing more than one subject, and makes void so much of any act as shall not be expressed in its title. Const. art. 5, § 21. Provisions of this character are usually inserted in constitutions, the object being, as was stated by the supreme court of Iowa, to prevent the union in the same act of incongruous matters, and of objects having no connection or no relation. *State v. County Judge*, 2 Iowa, 280. But Mr. Cooley says the general purpose of these provisions is accomplished when a law has but one general object which is fairly indicated by its title. Cooley, Const. Lim. 144. This learned author further says in the same connection:

"To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible."

Courts and law writers have said that the generality of the title of a bill is no objection to it, and that it is not required that the body of a bill shall be a repetition of its title. The lamented THATCHER, when chief justice of this court, in commenting upon the constitutional provisions referred to, used the following language, which has since been accepted as the true interpretation of the provision:

"That under our constitution so much of any act as is not directly germane to the subject expressed in the title is without force; that the provision, instead of being only a rule of the general assembly to regulate their procedure, is a mandatory declaration of an essential condition to the validity of legislative enactments." *Central & G. R. Co. v. People*, 5 Colo. 41.

If subjects diverse in their natures, having no necessary connection with each other, be joined together in a bill, or subjects be inserted of which the title gives no intimation, it is an imposition upon the legislature and the public as well, and constitutes the very evil against which the constitution sought to guard. But as we said in *Golden Canal Co. v. Bright*, 6 Pac. Rep. 142: "This constitutional inhibition must have a reasonable construction. It is enough if the bill treats of but one general object, and that object is expressed in the title. To require that each subdivision of the subject, each and every of the end and means necessary or convenient for the accomplishment of the object, must be specifically mentioned in the title, would greatly impede and embarrass legislation."

The act in question relates to the general subject of elections, and to say that the qualifications of those to be elected, as well as the qualifications of the electors, is not germane to the subject, might produce disastrous consequences. If such a ruling should be made it might serve as a precedent for annulling the act in other essential particulars certainly not more germane to the title than this one. The act has been in force for eight years, and valuable rights have accrued under it. To declare an act of the legislature unconstitutional is always a delicate duty, and one which courts do not feel authorized to perform, unless the conflict between the law and the constitution is clear and unmistakable. We are not prepared to say that the qualification for elective offices is so foreign to the title of the act of March 8, 1877, or so foreign to the ostensible purpose of that statute, as to make it obnoxious to the constitutional provision referred to. It must be admitted that the insertion of this rule of qualification was unfortunate, and that the provisions of the statute of Edward VI. are much more salutary upon this point, and ought to receive legislative recognition.

The demurrer will be sustained.

SUPREME COURT OF CALIFORNIA.

Ex parte LOU AH SUN. (No. 20,090.)

Filed June 17, 1885.

CRIMINAL LAW—MISDEMEANOR—JURISDICTION BY CONSENT—CHANGE OF PLACE OF TRIAL.

In a prosecution for misdemeanor, commenced before one justice of the peace, but transferred for trial to another justice of the same county, without any affidavit for the change, such as required by statute, (Cal. Penal Code, § 1431,) an appearance by the accused, and submission to the jurisdiction of the trial court, without any objection thereto, confers jurisdiction by consent on the trial court.

Application for writ of *habeas corpus*.

Jackson Hatch, J. V. Lewis, and Jones & Martin, for petitioner.

Chipman & Garter and L. V. Hitchcock, contra.

THORNTON, J. The petitioner was prosecuted for a misdemeanor, committed in violation of section 418 of the Penal Code. The prosecution was commenced before Justice of the Peace GEDNEY, for the county of Tehama, and by him transferred to the court of a justice of the peace named COMSTOCK, of the same county, for trial. The trial took place before Justice COMSTOCK, and resulted in the conviction of the petitioner. He is now imprisoned upon a commitment issued on such conviction, and this application is made to be discharged therefrom.

It is argued that the place of trial was changed in a mode not provided by law, and we are referred on this point to section 1431 of the Penal Code. It appears from that section that the place of trial can be changed on the affidavit of defendant, or on affidavits of other persons, showing the existence of a state of matters which, under the section cited, justifies such change. No affidavit was made in this case, and it is argued from this that Justice Comstock had no jurisdiction to try the case. But the petitioner appeared before Justice COMSTOCK, was tried and convicted, without any objection to the jurisdiction. The offense (a misdemeanor) is charged to have been committed in Tehama county, and of such offenses every justice of the peace of that county has jurisdiction. Code Civil Proc. § 115. There is, then, no difficulty as to jurisdiction of the subject-matter, and under the circumstances of this case the petitioner, having appeared and submitted to the jurisdiction of the trial court without making any objection thereto, I am of opinion that the court had jurisdiction of the person of the petitioner by his consent, and it is settled law that consent can give jurisdiction of the party, though not of the subject-matter.

Though the point is not material here, I will say that, in my judgment, the complaint is sufficient, and sets forth facts constituting an offense. The judgment is not void, but regular in all respects. The

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prisoner can be discharged under it, after he is imprisoned, by paying the remainder of the fine due, after being credited at the rate of one dollar a day for as many days as he has suffered imprisonment.

Writ denied, and petitioner remanded.

(67 Cal. 124)

GERALD v. J. M. BRUNSWICK & BAKER Co. (No. 8,526.)

Filed June 22, 1885.

NEW TRIAL FOR INSUFFICIENCY OF EVIDENCE DISCRETIONARY.

A motion for a new trial on the ground of insufficiency of the evidence to justify the verdict, is addressed to the sound legal discretion of the court, and an order thereon will not be interfered with on appeal, except for manifest abuse of such discretion.

Department 2. Appeal from the superior court of the city and county of San Francisco.

T. J. Crowley and *A. Comte, Jr.*, for appellant.

Rothschild & Marx and *J. E. McElrath*, for respondent.

THORNTON, J. The specifications of the particulars in which the evidence was insufficient to justify the verdict are sufficient. This appeal is from an order granting a new trial, on motion of the defendant. The only ground on which the court below could have granted it, was the insufficiency of the evidence to justify the verdict; and it has been uniformly held by this court that a motion for a new trial on this ground is addressed to the sound legal discretion of the court, and that, on appeal from an order of the trial court granting such new trial, this court will not reverse the order unless it appears that there has been a manifest abuse of such discretion. *Hall v. The Emily Brownrigg*, 33 Cal. 522; *Phelps v. Union C. M. Co.* 39 Cal. 410; *Pierce v. Schaden*, 55 Cal. 406; *Bronner v. Wetzlar*, Id. 419. We find no abuse of discretion here, though the evidence is conflicting. *Oullahan v. Starbuck*, 21 Cal. 413; *Dickey v. Davis*, 39 Cal. 565.

Order affirmed.

We concur: SHARPSTEIN, J.; MYRICK, J.

(2 Cal. Unrep. 485)

MARTIN v. VANDERHOOF. (No. 9,745.)

Filed June 17, 1885.

STATEMENT ON MOTION FOR NEW TRIAL—SUFFICIENCY OF.

A statement on motion for a new trial, if neither signed nor certified by the judge of the court below, will, on appeal, be stricken out.

Department 1. Appeal from the superior court of Sonoma county. Hearing on a motion to dismiss the appeal, and also to strike out the so-called statement, on motion for a new trial, on the ground that it was not certified by the judge of the court below, as required by statute. Code Civil Proc. Cal. § 659.

D. C. Allen and *W. W. Porter*, for appellant.

A. B. Ware, for respondent.

By THE COURT. The motion to strike out the so-called statement on motion for a new trial is granted. The motion to dismiss the appeal is denied.

SUPREME COURT OF OREGON.

(12 Or. 308)

PRUDEN v. GRANT CO.

Filed June 2, 1885.

LIABILITY OF COUNTY UPON ITS CONTRACTS—COUNTY AS MEDIUM FOR ACTS OF SOVEREIGN STATE.

Where a county deals with a party in its corporate capacity, and violates its obligation or duty, it may be sued the same as a natural person; but where the sovereign power of the state is exercised through a county organization, a claim to compensation, created in discharge of a duty in such a case, must be adjusted in the mode pointed out by law.

Appeal from Grant county.

Morton D. Clifford, Dist. Atty., C. W. Parrish, and George H. Williams, for appellant.

L. L. McArthur, for respondent.

THAYER, J. The court, upon consideration of this case, is of opinion that the decision in *Cook v. Multnomah Co.* 8 Or. 170, is decisive of the question involved here. The service which the respondent was required to perform was for the public benefit, and while he is entitled, under the constitution of the state, to just compensation therefor, yet he must acquiesce in the mode prescribed by law to obtain it. The coroner subpoenaed him as a physician and surgeon to attend the inquest, and, under the law, it became his duty, in the presence of the jury, to inspect the body of the deceased, and give a professional opinion as to the cause of the death. Crim. Code, § 455. It then became the coroner's duty to return to the county court a statement of the expense attending the inquest, which that court was required to audit and pay to the persons to whom the items thereof were due, in the same manner as ordinary claims against the county. Id. 463. The court is of opinion that, in auditing an account for services in such cases, where the amount of compensation is not fixed by law, it is the duty of the county court to inquire into and ascertain the same, and that the amount so determined upon and paid, must be regarded as just compensation for the services performed; that the county court acts judicially in such a case; that its acts constitute the transaction of county business; and that when it exercises its functions in determining the amount of the claim erroneously, or exceeds its jurisdiction to the injury of a substantial right of the claimant, its decision may be reviewed by writ of review, as provided in the Code of Civil Procedure.

The case is unlike that of *Crossan v. Wasco Co.* 10 Or. 111. There the amount of compensation for the services was prescribed by statute. Nor is the investment of the county court with such jurisdiction, and limiting the remedy of a claimant to its exercise in such a case, the violation of any constitutional right of trial by jury. No action can

be maintained against a county, under the laws of this state, except upon a contract made by such county in its corporate character, and within the scope of its authority, or for an injury to the rights of a party arising from some act or omission of such county. Civil Code, § 347. Where a claim to compensation for services has been created by the officers of a county in the discharge of a public duty enjoined by law, which is made chargeable upon the county, and the amount is not prescribed by statute, the claimant cannot maintain an action thereon against the county, but must submit to the adjustment of the county court, as before mentioned. Where a county deals with a party in its corporate capacity, and violates its obligation or duty, it may be sued the same as a natural person; but where the sovereign power of the state is exercised through a county organization,—employs the latter as a means and agency for the purpose of regulating and controlling affairs which are for the benefit of the whole community,—a claim to compensation, created in the discharge of a duty in such a case, must be adjusted in the mode pointed out by law. The ordinary remedy for the enforcement of a right is not necessarily reserved to such a claimant. It is optional with the legislature to give that or some other substantial remedy, and, in the opinion of the court, it has done the latter in the class of cases referred to. The demurrer, therefore, to the complaint should have been sustained.

The judgment must consequently be reversed, and the case remanded to the court below for further proceedings, as above indicated.

WALDO, C. J., did not sit in this case.

(12 Or. 311)

KEARNEY v. SNODGRASS and others.

Filed June 3, 1885.

APPELLATE COURT—MOTION FOR A NEW TRIAL.

An order upon a motion for a new trial cannot be considered in review by an appellate court.

Appeal from Umatilla county.

R. Williams, for appellant.

W. Lair Hill and *H. Y. Thompson*, for respondents.

WALDO, C. J. This case is before us on a petition for a rehearing. The action was brought against Foster, Reeves, Snodgrass, and Minor, as partners and principals, and R. G. Thompson as surety, on a promissory note executed by Foster in the name of the partnership, Foster, Reeves & Co., and signed by R. G. Thompson as surety. Snodgrass and Minor, the appellants here, denied the complaint. They also set up as a separate defense that the note was given in execution of a contract made by Foster & Reeves with the plaintiff, to which contract they were and are strangers, and they also set up what they claim to have been the actual business relations between

the alleged partners, which did not extend to the transaction in question. The so-called separate defense was, doubtless, immaterial, and might have been stricken out on motion.

When the case was first before us we examined it, in effect, as if it were before us on a motion for a new trial. The case is, in fact, here on a bill of exceptions, on appeal, as a substitute for a writ of error. The distinction is important. In the latter case we have nothing to do with the merits of the verdict, or with the evidence as a whole, which has been set out in full in the transcript. Only so much of the testimony should be put into a bill of exceptions as is necessary to explain the exceptions taken. *Johnston v. Jones*, 1 Black, 220. At the same time, the record should show the relevancy of the exception to the issue. *Hughes v. Parker*, 1 Port. 141.

No writ of error lay at common law, or under the statute of Edw. I., to the decision on a motion for a new trial. "A new trial," says TUCKER, J., in *Kinney v. Beverly*, 2 Hen. & M. 327, "is only a new invention introduced on account of the severity of the judgment of *attaint*, to avoid which it was thought best to proceed in a milder way, and so new trials were introduced." "An application for a new trial was not a matter of right. It was granted *ex gr.*, to prevent a failure of justice." GIBSON, C. J., said that a writ of error founded on a mistake of the jury in deciding facts would be a novelty in our jurisprudence, (*Burd v. Dansdale*, 2 Bin. 90;) or, as he expressed it in *Sidwell v. Evans*, 1 Penr. & W. 383, S. C. 21 Amer. Dec. 387, it is not the business of the court on a bill of exceptions to judge of the quantum of proof, or to correct the errors of the jury. A "bill of exceptions," as the very expression shows, must contain exceptions. *U. S. v. Jarvis*, 3 Wood. & M. C. C. 225. But an exception lay only for some error of law occurring at the trial. *Onondaga Ins. Co. v. Minard*, 2 N. Y. 98; *Walton v. U. S.* 9 Wheat. 657; *Doddridge v. Gaines*, 1 McArthur, 339. This definition has been incorporated into our civil procedure act. Gen. Laws Or. 151, § 227. A motion for a new trial was made after verdict and before judgment, and hence no *exception* lay to any ruling made on such motion. The reason arose out of the nature of a motion for a new trial itself, in which the cardinal object was not to correct the errors of the court, but of the jury. The first reported case where a new trial was granted, (*Wood v. Gunston*, Styles, 466,) in the time of the Protectorate, was to give a second jury the opportunity to correct an error of the first. GLYN, C. J., said in that case that it was for "the people's benefit" that new trials should sometimes be had. But he seems not to have forgotten that the power might easily be exercised to their detriment. The discretion of courts has sometimes been called the law of tyrants.

Lord KENYON said, in *Calcraft v. Gibbs*, 5 Term R. 20, that an application for a new trial was a direct appeal to the laws and justice of the country, and could not be tried and disposed of on any other rule. So, in *Rex v. Mawbey*, 6 Term R. 638, he said:

"I think the rule was correctly stated by the counsel for the defendants, that in granting new trials the court knew no limitations except in some excepted cases; but they will either grant or refuse a new trial as will tend to the advancement of justice."

And see BULLER, J., *Wilkinson v. Payne*, 4 Term R. 468; AMHURST, J., *Edmondson v. Machell*, 2 Term R. 5; Lord MANSFIELD, *Bright v. Eynon*, 1 Burr. 393; *Hewitt v. Jones*, 72 Ill. 218. So it is said in *Smith v. Brampston*, 2 Salk. 644, note, that where complete and substantial justice has been done, a new trial will not be granted, though the judge who tried the case may have been mistaken in point of law; nor will the court give a second chance to an unanswerable defense, though the verdict be against the weight of evidence and the strict rule of law. In *McLanahan v. Universal Ins. Co.* 1 Pet. 183, Mr. Justice STORY said:

"It is to be considered that these points do not come before this court on a motion for a new trial after verdict, addressing itself to the sound discretion of the court. In such cases the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it are adopted by the court itself. If, therefore, upon the whole case, justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial. The reason is that the application is not matter of absolute right in the party, but rests in the judgment of the court, and is to be granted only when it is in furtherance of substantial justice. The case is far different upon a writ of error, bringing the proceedings at the trial, by a bill of exceptions, to the cognizance of the appellate court. The directions of the court must then stand or fall upon their own intrinsic propriety as matter of law."

The practice in England in regard to new trials seems to have been, when the trial was at *nisi prius*, to get leave of the judge who presided at the trial to move for a new trial. If leave were granted, the motion was heard on the judge's report before court in bank at Westminster, and the decision was final. *Müller v. Baker*, 20 Pick. 285; *Johnson v. Macon*, 1 Wash. (Va.) 5.

There is no express provision in our Code of Civil Procedure for the review of the decision of a circuit court on a motion for a new trial. The Code has defined an exception, which must be taken before verdict. A bill of "exceptions," therefore, will not lie more than at common law. An appeal may be taken from an order affecting a substantial right, and which, in effect, determines the action so as to prevent a judgment. Section 525. An order denying a new trial does not affect a substantial right. Until the right of appeal is created by statute it does not exist as a strict legal right, nor does it determine the action so as to prevent a judgment. So it is not a final order under the same section, affecting a substantial right, or made in a proceeding after judgment. Such an order is not made after judgment. The motion suspends the judgment. *Truett v. Legg*, 32 Md. 149; *Page v. Cole*, 123 Mass. 93. It is not an intermediate order involving the merits of the action under section 535. See opinion of SELDEN, J., *St. John v. West*, 4 How. Pr. 332. Title 8, Gen. Laws

Or. p. 152, provides for what causes a verdict may be set aside and a new trial granted. Every cause mentioned depends on a question of fact except the last, and certain cases, probably, under the first subdivision. The sufficiency of the evidence under the sixth subdivision is a question of fact, though whether there be any evidence is a question of law. *BULLER, J., Carpenter's Co. v. Hayward*, 1 Doug. 875.

It has been expressly decided by this court that an appeal will not lie in such cases from a decision on a question of fact. Thus *BOISE, J., in State v. Fitzhugh*, 2 Or. 236, said:

"As to those matters which were contained in the affidavits filed in support of the motion for a new trial, they were questions of fact, and were addressed to the sound discretion of the circuit court, and are, therefore, not the subject of review here."

And in *Hallock v. Portland*, 8 Or. 29, *PRIM, J.*, said:

"As the motion for a new trial was founded wholly upon the insufficiency of the evidence to justify the finding of fact, the granting the motion was a matter resting wholly in the discretion of the court below, and cannot be reviewed on appeal."

In Massachusetts there is a statute providing that exceptions may be taken to the opinion, ruling, direction, or judgment given or made on a motion for a new trial. The matters of law referred to seem to have been other than those available on a bill of exceptions. But it is there held that a motion for a new trial, so far as it depends on a question of fact, is addressed exclusively to the discretion of the presiding judge. *Doyle v. Dixon*, 97 Mass. 213. Hence no appeal lies from a decision on a motion for a new trial on the ground of newly-discovered evidence, or insufficiency of the evidence to justify the verdict, or that the damages are excessive, or on any other question of fact. *Shea v. Lawrence*, 1 Allen, 170; *Lowell Gas-light Co. v. Bean*, Id. 274; *Merritt v. Morse*, 113 Mass. 271; *Norton v. Wilbur*, 5 Gray, 7; *Kidney v. Richards*, 10 Allen, 419; *Hubbard v. Gale*, 105 Mass. 511. Now, if there be no appeal under title 8, p. 152, Gen. Laws Or., from decisions on motions for new trials on questions of fact, as has been decided, for the same reason there is none on questions of law, —because the statute does not give it. For most, if not all, the errors of law mentioned in that title there is a remedy on appeal from the judgment or final order. But if a party choose to move for a new trial in the court below on points contained in his bill of exceptions, there is a question if he must not abandon his exceptions, if so required. *Meeker v. Roylan*, 27 N. J. Law, 263; *Sylvester v. Mayo*, 1 Cush. 308; *West v. Cunningham*, 9 Port. 109; *Berry v. Singer*, 10 Ark. 483. If an appeal were to lie at all from a decision on a motion for a new trial, the proper practice would seem to be to appeal from the order, and thereby preserve the distinct character of the proceeding. See *Elliott v. Benedict*, 13 R. I. 466. Or, if the statute were to permit the two proceedings to be joined in the same

appeal, they should be kept distinct. See *Elkins v. Boston & A. R. R.* 115 Mass. 190. It is evident, therefore, that if an order on a motion for a new trial were appealable, the statute should provide that a case should be made specially for that purpose. *Farmers' Bank v. Whinfield*, 24 Wend. 420. We have no such provision. A bill of exceptions does not, as we have seen, extend to it. It follows that the assignment of error in overruling a motion for a new trial, so frequently found in our bills of exceptions, is a nullity. It is with us as at common law, and with some of the other states,—such matters lie in the discretion of the judge presiding at the trial. *Sittig v. Birkestack*, 38 Md. 158; *Final v. Backus*, 18 Mich. 218. It was error, therefore, in the case in hand, to examine it as if it were a motion for a new trial. It is here on a bill of exceptions to the directions given the jury. Those which present the most difficulty were on the law of limited partnership under the statute. There was no question of the kind in the case. They were abstract propositions of law which could not be, and were not attempted to be, applied to the case. It is claimed, however, that the jury were, or might have been, misled by them. This is true; but it is not error, simply, but error excepted to, and properly excepted to, that constitutes ground for reversal. The court must be informed of the ground of the exception. An exception in general terms to an instruction which is correct in point of law, can never avail the party on a bill of exceptions. In *Jones v. Osgood*, 6 N. Y. 235, the court say:

"The exceptions did not call the attention of the judge to the points which were claimed to be erroneous. They did not suggest to his mind what the counsel excepting would have him hold, or wherein his charge was wrong."

So, in *Sharp v. Burns*, 35 Ala. 663:

"If the charge was ambiguous, or tended to mislead the jury, without asserting an erroneous proposition of law, the defendants should have protected themselves by asking an explanation."

The proper practice in such a case is to except to the instruction, and ask that the proper instruction be given. *Reed v. Call*, 5 Cush. 14; *Edwards v. Carr*, 13 Gray, 238. Or where, as in this case, the instruction was wholly irrelevant, to call the attention of the court to the fact, and ask that it be withdrawn. *Carlock v. Spencer*, 7 Ark. 12. See *Warner v. Dunnavan*, 23 Ill. 380. *PATESON, J., Taylor v. Willans*, 2 Barn. & Adol. 861; *Carver v. Astor*, 4 Pet. 81; *Ex parte Crane*, 5 Pet. 198; *Geary v. People*, 22 Mich. 220; *Stroud v. Frith*, 11 Barb. 302; *Sittig v. Birkestack*, 38 Md. 158.

The exceptions were themselves misleading. The court could not know in what the alleged error consisted, or what counsel would have. As propositions of law they were not incorrect; and if so, they did not apply to any issue in the case. "A decision on an abstract question of law, if clearly wrong, is no ground for reversal." *Hughes v. Parker*, 1 Port. 144. The real error was a far different one, and

one which, having escaped the vigilance of counsel at the trial, cannot now avail him.

No just objection lies to any other of the instructions. As a question of law, if Foster & Reeves made a contract with Kearney for cattle to be delivered at a certain time, and upon such delivery they were to execute to Kearney their promissory note in payment, and before the day of delivery arrives Snodgrass & Minor entered into a contract with Foster & Reeves by which they were to become partners in the purchase of the cattle, and if, in pursuance of such an agreement, the note was executed in the name of the partnership, Snodgrass & Minor became liable to Kearney, although Kearney, at the time he took the note, knew nothing of such agreement. *Johnston v. Warden*, 3 Watts, 101. So the question of sale was one of law, which the court should have decided. The original contract in writing shows that there was no sale prior to the date of the alleged partnership agreement, and consequently there was no indebtedness to be assumed.

A complete answer to the objections to the special findings of the jury is the original contract itself, which shows but an agreement to sell on which either party to the contract might have been held liable in damages for failure to perform, but which effected no change of title, nor created any present indebtedness. The jury say in the first finding that there was no purchase. They therefore found correctly what they should not have been called upon to find at all. The second finding related to the formation of the partnership. At that time there was nothing due Kearney on the cattle; consequently they must find, as they did in their finding, that Snodgrass & Minor did not assume, for a valuable consideration or otherwise, a debt which did not exist. There is no inconsistency whatever, then, between the special findings, so called, and the general verdict.

The above considerations directly and indirectly cover all the points of law argued and relied upon by counsel. They constitute no ground for reversal. The judgment must therefore be affirmed.

THAYER, J., did not sit.

(12 Or. 322)

BRUNDAGE v. MONUMENTAL SILVER MIN. Co. and others.

Filed June 8, 1885.

1. CORPORATIONS—BILL IN EQUITY—CREDITOR OF A CORPORATION—JOINDER OF PARTIES.

When a bill, although in the form of a creditors' bill, is brought, not to settle and wind up the affairs of a corporation, but solely to obtain the payment of the plaintiff's judgment, and it does not appear, by the bill or otherwise, that there are any other creditors who wish to be made parties, a judgment creditor who has exhausted his legal remedy ought not to be stayed in his suit to pursue any equitable interest or demand of his debtor, in the absence of any showing by them objecting that there are any other creditors.

2. SAME—UNPAID SUBSCRIPTION OF STOCKHOLDER.

A creditor of a corporation may, by a bill in equity, enforce payment of his claim out of the unpaid subscription of a stockholder.

Appeal from Multnomah county.

A. S. Bennett, for respondents.

W. B. Gilbert and H. T. Bingham, for appellant.

LORD, J. This is a suit in equity to enforce the individual liability of stockholders for an indebtedness of the corporation. The defendants Fleckenstein & Mayer demurred to the complaint upon the grounds that there was a non-joinder of parties plaintiff and defendant, which the court overruled; whereupon the defendants filed an answer in the nature of a plea in abatement, alleging that certain persons not made defendants were stockholders in the defendant corporation, to which the plaintiff demurred, and the court sustained the demurrer, and a decree was taken in favor of the plaintiff, from which the defendants appeal, and present two questions for our determination, viz.: (1) Whether the suit must be brought in the name and for the benefit of all the creditors; and (2) whether all the stockholders must be made parties defendant. The constitution provides that "the stockholders of all corporations and joint-stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more." Section 3, art. 11, Const. By this section the liability of stockholders of a corporation is limited to the amount of their stock subscribed and unpaid; and the remedy to enforce this liability, it has been held, is in equity, where the rights of the corporation, the stockholders, and all the creditors can be adjusted in one suit. *Ladd v. Cartwright*, 7 Or. 329; *Hodges v. Silver Hill Min. Co.* 9 Or. 200. The liability of the stockholders for the indebtedness of the corporation constitutes, in part, at least, the basis of its credit, and, so far as creditors are concerned, is part of its assets. The unpaid subscriptions to the capital stock, due from the stockholders to the corporation, are regarded in equity as a trust fund to be held by the corporation for the benefit of its creditors. As said by Mr. Chief Justice WAITE in *Patterson v. Lynde*, 106 U. S. 520; S. C. 1 Sup. Ct. Rep. 432:

"The constitution of Oregon created no new right in this particular; it simply provided for the preservation of an old one. The liability under this provision is not to the creditors, but for the indebtedness. That is no more than the liability created by the subscription. The subscription is part of the assets of the corporation, at least so far as creditors are concerned. The liability of the stockholders to the creditor is through the corporation, not direct. There is no privity of contract between them, and the creditor has not been given, either by the constitution or statute, any new remedy for the enforcement of his rights. The stockholder is liable to the extent that the subscription represented by his stock requires him to contribute to the corporate funds, and, when sued for the money he owes, it must be in a way to put what he pays directly or indirectly into the treasury of the corporation for distribution according to law. No one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself."

The liability, therefore, of the stockholders upon their unpaid subscription to the capital stock being a trust fund in equity for the

payment of the debts of the corporation, all the creditors are entitled to share in it. As a result of this doctrine, the general proposition is well sustained by the authorities that a judgment creditor of the corporation, who has exhausted his remedy at law, may maintain a suit in equity in his own behalf, and in behalf of such other creditors of the corporation as may unite to become parties with him, against the corporation and its delinquent stockholders, and have a decree that an account of the assets and debts of the corporation be taken, and that the stockholders pay in and account for so much as may be due from them respectively to the corporation on account of their capital stock, as will be sufficient to pay the debts represented by the plaintiff and such other creditors as may join. *Adler v. Manuf'g Co.* 13 Wis. 63; *Mann v. Pentz*, 3 N. Y. 415; *Ogilvie v. Knox Ins. Co.* 22 How. 380; *Crease v. Babcock*, 10 Metc. 525; *Umsted v. Buskirk*, 17 Ohio St. 113; *Wood v. Dummer*, 3 Mason, 308; *Thomp. Liab. Stockh.* § 351; 2 Story, Eq. Jur. 1252. When the object of the bill is to settle or wind up the affairs of the corporation which is insolvent, and it becomes necessary to ascertain the whole amount of the indebtedness and to whom due, and also who are liable to contribute upon their unpaid stock subscriptions, the necessity of bringing the suit in the name and for the benefit of all the creditors of the corporation, and against all the stockholders found within the jurisdiction, is conceded. But when the bill is not brought for that purpose, although in the form of an ordinary creditors' bill, as the case here, but seeks solely to obtain the payment of the plaintiff's judgment, and it does not appear by the bill or otherwise that there are any other creditors who wish to be made parties, a judgment creditor who has exhausted his legal remedy ought not to be stayed in his suit to pursue any equitable interest or demand of his debtor, in the absence of any showing by them objecting that there are any other creditors.

Upon the facts as presented by this record we do not think the first objection available. But it is upon the second point, that all the stockholders of the corporation should be made parties defendant, that the defendants more strenuously insist. Upon this point the substance of their contention is that the effect of the decision in *Ladd v. Cartwright*, *supra*, establishing the remedy of the creditor of an insolvent corporation in equity, and not at law, to enforce the liability of the stockholder upon his unpaid subscriptions, where, as the court say, "the rights of the corporation, the stockholder, and all the creditors can be adjusted in one suit," necessarily precludes the right of such creditor to proceed against one or more delinquent stockholders for his debt. But this does not follow from the mere fact that the suit is in equity and not at law. When the object of the bill is to wind up the affairs of the insolvent corporation, and the presence of all parties is necessary to properly adjust the equities, and to avoid a multiplicity of suits, they may be brought in and made parties. This is only the advantage which equity affords when the nature of

the suit requires it. But it is not enough to defeat a creditor's right to pursue his remedy in equity, when he seeks to obtain the payment of his judgment against an insolvent corporation by subjecting some equitable interest or demand due it, by simply suggesting, in way of answer in abatement of the suit, that there are other stockholders. While it is true that the liability of the stockholder upon his unpaid subscription is not to the creditor, but for the indebtedness of the corporation, yet as a debtor to the corporation upon such unpaid stock, it may be pursued in his hands. "A judgment creditor," says Mr. Justice BRADLEY, "who has exhausted his legal remedy, may pursue in a court of equity any equitable interest, trust, or demand of his debtor in whosoever hands it may be. And if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate share of the liability, he might never get his money." *Marsh v. Burroughs*, 1 Woods, 468. And as the object of the present bill is not to settle the affairs of the corporation, but is brought simply for the purpose of securing the payment of a judgment debt out of the unpaid stock subscriptions, we think the language of Mr. Justice STRONG in *Hatch v. Dana*, 101 U. S. 210, peculiarly applicable to the case under consideration, and decisive of it. He said:

"The liability of a subscriber for the capital stock of a company is several and not joint. By his subscription, each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. A creditors' bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of this corporation, all the stockholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property,—that is, out of its unpaid stock,—there is not the same reason for requiring all the stockholders to be made defendants. In such case no stockholder can be made to pay more than he owes."

So, also, in *Ogilvie v. Knox Ins. Co.* 22 How. 380, it was objected, as here, that the bill was defective for want of proper parties, but the court held the objection untenable. In delivering the opinion of the court, GRIER, J., said:

"The creditors of the corporation are seeking satisfaction out of the assets of the company, to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of the corporation, and the equities between its various stockholders, corporations, or debtors. If A. is bound to

pay his debt to the corporation in order to satisfy its creditors, he cannot defend himself by pleading that these complainants might have got their satisfaction out of B. as well. It is true, if it be necessary to a complete satisfaction of the complainants that the corporation be treated as an insolvent; the court may appoint a receiver, with authority to collect and receive all the debts due to the company, and administer all the assets. In that way all the other stockholders may be made to contribute."

See, also, *Bartlett v. Drew*, 57 N. Y. 587; *Pierce v. Milwaukee Con. Co.* 38 Wis. 253.

In this suit the parties are shown to be numerous and widely scattered. It is brought against 22 stockholders, and the plea in abatement shows that there are 34 others living in four different counties. Nor is there any pretense that this is all, or that they are within the jurisdiction of the court. To abate this suit and compel the plaintiff to begin anew, so as to make these stockholders designated in the plea in abatement parties defendant, then, out of the numerous shares still unaccounted for, when these new defendants are brought in, other stockholders may be pointed out, and the process of abating the suit carried to an extent that would amount to a practical denial of justice. The contention of the plaintiff is that it is not his business to bring in these new parties, but that if the defendants want other stockholders brought in for the purpose of equalizing the burdens by contribution among themselves, it being for their benefit and interest, they must bring them in at their own expense by an answer or other proper proceeding.

In *Hatch v. Dana*, *supra*, in further delivering the opinion of the court, STRONG, J., said:

"That the complainant was under no obligation to make all the stockholders of the bank defendants in his bill. It was not his duty to marshal the assets of the bank, or to adjust the equities between the corporators. In all that he had no interest. The appellant may have had such an interest, and, if so, it was quite in their power to secure its protection. They might have moved for a receiver, or they might have filed a cross-bill, obtained a discovery of the other stockholders, brought them in, and enforced contribution from all who had not paid their stock subscriptions. Their equitable right to contribution is not yet lost."

We think the decree of the court below must be affirmed.

(12 Or. 329)

GRANT, Adm'r, v. BAKER and others.

Filed June 8, 1885.

1. NONSUIT—WHAT FAILURE OF PROOF NECESSARY.

To authorize a court to nonsuit a plaintiff, the latter must fail to prove a cause sufficient to be submitted to a jury.

2. ACTION FOR DEATH CAUSED BY NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action for damages for injury or death resulting from defendant's negligence, it is not obligatory on the plaintiff, in order to recover, to show that there was no contributory negligence.

Appeal from Clatsop county.

G. W. Yocum and Raleigh Stott, for appellant.

F. R. Strong, for respondents.

THAYER, J. This appeal is from the circuit court for the county of Clatsop. The appellant commenced an action in that court against the respondent to recover damages for wrongfully causing the death of Peter Grant. The appellant alleged in his complaint, in substance, that he was the administrator of said Peter Grant, and that the respondents were officers of the municipal corporation of the city of Astoria, in said county, constituting the common council of said city; that by the charter of said city it was the duty of the said common council to keep the streets of the said city in good order and repair, and safe for travel; that they willfully neglected their duty, and permitted one of the said streets, known as "Squemoque Street," to become so much out of repair that it became unsafe for travel, and that, after being notified of the fact, they refused to repair it; that while said Peter Grant was lawfully traveling said street on the twenty-seventh day of November, 1881, and wholly unaware of the danger, he was accidentally, and without fault on his part, precipitated over the edge of the road-way, and thereby killed, which accident the appellant alleged was in consequence of the respondents' said neglect. The respondents filed an answer to the said complaint, in which they denied all the allegations thereof; and thereafter, at the January term, 1884, of said court, the issues so formed came on for trial before the said court, and a jury duly impaneled.

The appellant upon the trial gave evidence tending to prove the facts alleged in his complaint. It appears from the bill of exceptions that said Peter Grant was last seen alive on the evening previous to the said twenty-seventh day of November, 1881; that on the morning of that day he was found dead, lying in the mud and water in front of said street, opposite to where a railing had been off for some time. It also appears that said deceased had his lodgings at a house on said street, and that when last seen, upon the evening previous to his death, he was at the Occident Hotel, in Astoria; that between 10 and 11 o'clock at night he left there with the evident intention of going to his lodgings; that his route would naturally be along said street, which was considerably incumbered with lumber at the time. The evidence offered was doubtless sufficient to authorize the inference that the deceased, while going to his lodgings on said occasion, and along said street, fell from the same to the place where he was found dead, in consequence of its being so filled up with timber and lumber, and the rail being off the side, placed there as a protection to persons passing along the same. The street appears to have been upon piles across some tide-land, and several feet above the surface.

The appellant having rested his case, the respondents moved the court for a nonsuit, upon the grounds (1) that the evidence was insufficient to entitle the appellant to a recovery; (2) that the appellant had failed to show that the deceased was without fault at the

time of the accident; that the appellant was required to show that deceased was, at the time of his death, free from contributory negligence, before a recovery could be had. The circuit court granted the motion, and the appellant was nonsuited, and judgment entered against him for costs, from which judgment this appeal is taken.

The first ground of the motion for the nonsuit was wholly untenable. The question whether the evidence was sufficient to entitle the appellant to a recovery was for the jury, and not the court. To authorize the court to nonsuit a plaintiff, the latter must fail to prove a cause sufficient to be submitted to the jury. It must be such a case that, if the jury were to find a verdict for the plaintiff, the court could be required to set it aside for want of evidence to support it. Civil Code, §§ 243, 244. It would have to be a case where there was a total failure of proof of some material allegation of the complaint, which appears, from the bill of exceptions, not to have been the fact in this case. I do not suppose the nonsuit was granted upon that ground. It was not so claimed on the argument, and, I think, the counsel on both sides concede that it was upon the second ground of the motion that it was allowed, and that the circuit judge, in allowing it, followed what he supposed to have been held in *Walsh v. Oregon Ry. & Nav. Co.* 10 Or. 250. The impression seems to have prevailed, to some extent, at least, that this court there held that a plaintiff would not be entitled to recover in an action for negligence without showing affirmatively that the injury was not the result of his own negligence; that he would have to first establish that there was no contributory negligence upon his part. I do not think that is the law, nor that the case of *Walsh v. Oregon Ry. & Nav. Co.* intended to hold any such doctrine. I suppose it was inferred that the court meant to lay down such a rule in the following language employed by the judge who delivered the opinion in the case:

"In actions for negligence, the burden of proof always rests upon the party charging it. He must prove that the accident was caused by the wrongful act, omission, or neglect of the defendant, and that the injury of which he complains was not the result of his own negligence, and the want of ordinary care and caution."

A casual observation of this language might justify the impression referred to; but, when considered in connection with the facts of that case, and with other portions of the opinion, it would hardly be warranted. The plaintiff in the case referred to was a brakeman on the defendant's train of cars. The track had been widened from a narrow gauge to a standard gauge, and the effect was to place the rail on one side of the bed nearer the water-tank located on the road. The train approached the point opposite the tank in the night, while the plaintiff was on the train attending to his duties. He was ignorant of the nearness of the water-tank to the track; heard a noise ahead that excited his suspicion that something might be wrong, and put his head out of the window to discover the cause. In the act of doing

that, in consequence of the proximity of the tank to the track, his head came in collision with the timbers which supported the tank, and thereby he received the injury complained of. When he attempted to prove his cause of action upon the trial, these facts, of course, all came out upon his own showing, and the circuit court before whom the trial was had, being of the opinion that the putting his head out of the window as mentioned, was carelessness upon his part which contributed to the injury, nonsuited him. The question then came before this court as to whether the nonsuit was properly granted, and in the consideration of that question the language quoted was made use of. The judge, in the opinion, also stated the following:

"To entitle, then, the plaintiff to recover, conceding the negligence of the defendant in not removing the water-tank to the proper distance after widening the track, it was incumbent on him to prove, when the accident occurred, that he exercised that ordinary care which a party ought to observe under the particular circumstances under which it is to be exercised."

It will be seen that the injury to the plaintiff in that case was the result of his own direct act: if he had not put his head out of the window, it would not have collided with the frame-work of the tank; and that, *prima facie*, he occasioned it himself. Whether the act was careless and negligent or not depended upon the facts, which it devolved upon him, under the peculiar circumstances of the case, to prove; and unless he established that the duty of his position made it necessary and proper to extend his head out of the window at the time, he had no case. The circuit court thought he had no right to do so under any circumstances; but this court, in view of the fact that the plaintiff was a brakeman on the train, and was required to constantly keep a lookout to avoid danger, and that there was evidence in the case tending to prove that it was a customary habit for brakemen to do so, concluded that he ought not to have been nonsuited, and therefore set it aside and ordered a new trial. It is very evident to my mind that the language of the opinion referred to was intended to apply to the state of facts mentioned, and not to lay down any general rule that would be applicable to any state of facts that might appear in that character of cases. I think it has always been understood by this court that contributory negligence is a defense, and must be averred as such. At the same time, the authorities agree that if it appears in such a case, upon the plaintiff's own showing, that if his own carelessness helped to produce the injury he complains of, he cannot recover. And I do not believe it would be any departure from the rule requiring such a defense to be pleaded, to say, as was said in *Walsh v. Oregon Ry. & Nav. Co.*, *supra*, where the plaintiff has been the actor in the affair in which the injury was received, and his acts *per se* would indicate negligence, "that he could not recover without proof that he exercised that ordinary care which a party ought to observe under the particular circumstances." Upon the other hand,

where the injury results from the direct act or omission of the defendant, which *prima facie* is negligence in itself, and the plaintiff receives an injury in consequence thereof while pursuing his ordinary course of affairs, he will not be compelled, in order to recover his damages, to prove that he was free from fault. For instance, suppose that some of the timbers of the frame-work of the water-tank referred to had been left so as to strike against a car, and that they did so strike and injure either the brakeman or a passenger who was sitting upon a seat inside, it would not certainly be necessary for the injured person, in order to recover against the company, to prove that he was free from fault; while, if he were apparently out of his place, or doing some act from which negligence might be imputed, it would become necessary to explain his conduct, and prove that, however it might seem, it was not negligence, or at least did not contribute to the injury.

In the case at bar the court should not have nonsuited the plaintiff. He made out a case sufficient for the jury, and they had a right to determine whether the conduct of the defendants in leaving the street incumbered in the manner described by the witnesses, and allowing a section of the railing to remain off, was negligence or not; whether the deceased came to his death in consequence thereof; and whether he might in some manner have contributed to the negligence, if any such existed. The latter could not be inferred except from some proof of circumstances. It is not presumable that a person will do careless and negligent acts that will jeopardize his own life; and yet, if the deceased knew the condition of the street, and it was a dark, rainy night, as some of the witnesses say it was, it might have been very imprudent for him to have attempted to travel the street under the circumstances. However that may have been, the question is one that a jury must determine, under the instructions of the court as to the law.

The judgment must be reversed, the nonsuit set aside, and a new trial had.

(12 Or. 319)

KIRK v. MATLOCK.

Filed June 8, 1885.

REPLEVIN—FAILURE TO ALLEGE PLACE FROM WHICH GOODS WERE TAKEN.

In an action of replevin, the failure to allege in the complaint the place from which the property was taken, is cured by verdict.

Appeal from Umatilla county.

J. J. Balleray, for appellant.

Wm. M. Ramsey and Geo. W. Wright, for respondent.

LORD, J. This is an action brought in a justice's court for the recovery of certain personal property. The complaint did not allege the place from which the property was taken. No objection was made to this in any form, but the defendant filed his answer, and

upon issue being joined the trial proceeded, resulting in a verdict and judgment for the plaintiff, from which the defendant appealed to the circuit court. Before proceeding to trial in the last-named court, the appellant filed a motion for judgment of dismissal, upon the ground that the facts stated did not show that the court had jurisdiction of the subject of the action. At the same time, the respondent filed a motion for leave to amend the complaint by adding the allegation of place omitted. The court allowed the motion to amend, and disallowed the motion to dismiss. Thereupon the appellant refused to plead, and the court ordered a default to be entered, and proceeded to hear said cause for the purpose of assessing damages, which, without further detail, resulted adversely to the appellant. The appellant insists that the omission to allege in the complaint the place where the property was taken and located, was fatal to the jurisdiction of the court, and that the court erred in allowing the motion to amend, and overruling his motion for judgment of dismissal. Originally the action of replevin lay only for goods distrained, and as the right of distress, which the action was intended to contest, was at common law local, this would seem to furnish the reason for holding the action to be local. However this may be, there can be little doubt but that the action of replevin at common law was treated as local, and that the action had to be brought in the county where the property was seized and located. *Williams v. Welch*, 5 Wend. 290; *Atkinson v. Holcomb*, 4 Cow. 45; *Robinson v. Mead*, 7 Mass. 353; 1 Chit. Pl. *185. The place was material and traversable, and if it be omitted the defendant may demur. *Walton v. Kersop*, 2 Wils. 354. But the omission to state the place in the declaration where the property was seized and located, may be cured by verdict. *Gardner v. Humphrey*, 10 Johns. 54; 2 Chit. Pl. *843, and note *h*. If the defendant pleaded *non cepit*, and the plaintiff cannot prove a caption, or that the defendant had the cattle, etc., in the place stated in his declaration, he will be nonsuited. 2 Chit. Pl. *843, and note *h*. This is in conformity with the general principle as stated, that "a defect in a pleading, whether of substance or form, which would have been fatal on demurrer, is cured by verdict, if the issue joined be such as necessarily required, on the trial, proof of the facts defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict." Proff. Jury, § 419.

The omission, therefore, to allege the place where the property was seized and located, was cured or supplied after verdict and judgment, when the defendant pleaded over without making any objection. The Code provides, upon an appeal from a justice's court, the action shall be tried anew upon substantially the issues tried in the court below. Code, § 553. If the effect of the verdict and judgment in the justice's court was to cure the defect now complained of, or supply its omission, the circuit court, for the purpose of trying the case substantially

upon the issue joined upon the record before it, was authorized to treat the omitted allegation as supplied or waived by the defendant. What difference then could there be in allowing the respondent to do what the record showed the verdict had cured, or the defendant had waived. The amendment allowed by the court did not change the issue tried in the justice's court, as proof of the omitted fact was essential to the verdict and judgment as rendered in that court. In furtherance of justice, and upon such terms as may be just, the circuit court was authorized to allow the pleadings in the action to be amended so as not to substantially change the issue tried in the justice's court. Justice's Code, § 81, p. 473.

Treating the case thus far upon the assumption that the action was local, as argued by counsel for the appellant in this court, we do not perceive that there was any error. But is this assumption true as applied to a justice's court? For the recovery of personal property distrained for any cause, the Code provides that the action shall be commenced and tried in the county in which the subject of the action, or some part thereof, is situated. Code, § 41, subd. 2. And as the mode of proceeding and the rules of evidence are the same in a justice's court as in a like action or proceeding in a court of record, this section applies to a justice's court, unless otherwise specially provided by the Code. Code, § 880. For the recovery of specific personal property, when the value of the property claimed, and the damages for the detention, do not exceed \$250, a justice's court has jurisdiction of the action, (subdivisions 1, 2, § 881,) but with the limitations stated. The jurisdiction of a justice's court does not depend upon where the cause arose, provided that the plaintiff or defendant shall reside in the precinct where the action is commenced, or personal service can be had on the defendant in any precinct in the county; and if the defendant do not reside in the state, the action may be commenced in any precinct in the state. Code, § 863.

Plainly, there was no error, in any view which may be applied to the record before us. The judgment must be affirmed.

(12 Or. 301)

SANFORD v. WHEELAN.

Filed June 1, 1885.

SPECIFIC PERFORMANCE—INCUMBERED PROPERTY.

Specific performance of a contract to purchase real property should not be decreed in a case where plaintiff, after in his agreement covenanting against incumbrances, permits such incumbrances to remain on the property without paying off the same, or reducing them to the amount of the purchase money contracted for.

Appeal from Umatilla county.

John J. Balleray, for respondent.

Richard Williams, for appellant.

THAYER, J. This appeal is from a decree of the circuit court for the county of Umatilla. The respondent commenced a suit in that

court against the appellant to enforce the specific performance of a written contract under seal, of which the following is a copy:

"Articles of agreement entered into this eighth day of April, A. D. 1882, between Stephen Sanford and James Wheelan: Witnesseth, that the said Stephen Sanford has sold, and doth agree, on or before the twenty-second day of April, A. D. 1882, to convey unto said James Wheelan, or his heirs or assigns, by a good and sufficient warranty deed of release and quitclaim, free from all incumbrances, north half of lot 4, in block 1, in the town of Pendleton, Umatilla county, Oregon, upon said James Wheelan's faithful compliance with the covenants herein contained, by him to be done and performed. And the said James Wheelan doth hereby agree to pay to the said Stephen Sanford the sum of three thousand dollars in gold coin, the consideration money for said premises, in the manner following: Cash in hand upon the execution of the deed hereinbefore referred to, of the sum of \$1,500, and the balance within one year from the date hereof. The said James Wheelan further agrees to pay all taxes and assessments that may be levied or assessed upon said premises during the time he shall hold the same under this agreement, and save the said Stephen Sanford harmless therefrom; and the said Stephen Sanford agrees that the said James Wheelan, complying with the covenants herein contained, to be done and performed by him, shall, from the twenty-second day of April, 1882, have and hold possession of said premises to use and occupy as his own in a husband-like manner.

"In witness whereof the parties hereto have set their hands and seals.

[Seal.]
[Seal.]

"S. SANFORD.
"JAMES WHEELAN.

"Executed in presence of

"FRED. PAGE TUSTIN.

"EDGAR J. SOMMERVILLE."

It was alleged in his complaint in the suit that on the said twenty-second day of April, 1882, the time the said conveyance was to be made as provided in said contract, that he prepared a deed of warranty, in terms conveying the said half of the said lot to the appellant, and that he was ready and willing to deliver the same to him, and to put him in possession of the said premises, but that the appellant refused to receive it, or go into the possession of the premises, or perform the contract, and the respondent claimed as relief a decree that the appellant be required to accept the said deed, and to pay him the said sums of money in accordance with said contract, and general relief. The appellant averred in his answer that the said premises were, at the time of the execution of the said contract, and on the said twenty-second day of April, incumbered by mortgages of large amount, one of which was in favor of H. J. Vanschuyver & Co., executed by the respondent to said H. J. Vanschuyver & Co., November 18, 1880, given to secure payment of a promissory note from the respondent to said company for the sum of \$1,540.66, with interest thereon from date, at the rate of 1 per cent. per month until paid, and for \$50 additional as attorney's fees, in case suit were instituted to collect it; that said note bore date November 17, 1880, and was payable in eight months thereafter. Another of said mortgages was executed by the respondent to S. Rothchild, R. Alexander, and Richard Lambert, to secure the payment of three promissory notes from the former

to the latter parties for the respective sums following: \$315.04, \$622.42, and \$203.99, each bearing date the twenty-fifth day of February, 1882, and payable 90 days therefrom, with interest at the rate of 10 per cent. per annum; and contained a provision for the payment of a reasonable attorney's fee in case suit was instituted to collect it; and that both of said mortgages were, at the date of the execution of said contract, and had ever since been, wholly unsatisfied. Other issues were tendered by the answer, but it is unnecessary to notice them.

The respondent, in his reply to said matter, in the answer averred that said appellant had, at the time the contract was executed, actual and personal notice of said incumbrances; that he conferred with the mortgagees, and that they assured him that they would interpose no objection to the said sale, and that each of the incumbrances could, by the decree of the court in the suit, be discharged and paid out of the agreed purchase price, which the appellant should be decreed to pay for the premises. The reply contained denials of other portions of the answer, but there was no other issue upon said matter of incumbrance than above mentioned. Testimony was taken in the case tending to prove and disprove the various issues between the parties. The circuit court heard the proofs and allegations, and decreed that the appellant pay into court immediately the sum of \$3,000, and that execution issue therefor, and that said sum of money be applied by the clerk of the court to the satisfaction of the said mortgages in the order in which they were mentioned in the answer, and that the deed executed by the respondent and wife, a deed prepared and signed after the commencement of the suit, upon the payment into court of said \$3,000, be delivered to the appellant; which is the decree appealed from. The only question of importance to be decided by this court is whether the appellant could equitably be compelled to accept the deed above referred to, and required to pay the sum stipulated. It was suggested at the hearing before this court that the vendor of real property could not enforce the payment of the purchase price in equity; but the rule seems to be otherwise. It proceeds upon the ground of a mutuality of remedies, the vendor in such cases having a right to compel the execution and delivery of the deed. The vendor may also enforce the undertaking of the vendee, although the substantial part of his relief is the recovery of money. Pom. Spec. Perf. Cont. § 6.

The authorities on the subject are very numerous and uniform except where the remedy has been limited by statute. The remedy of the vendor, however, like that of the vendee, depends upon the peculiar circumstances of the case. A court of equity ought not to interfere and compel the acceptance of a deed, and payment of the purchase money, where it would operate as a hardship upon the party, unless in strict conformity with his contract. In the case under consideration the appellant had agreed by the terms of the contract to purchase the half lot of land and pay for it \$3,000,—\$1,500 thereof

upon the execution of the deed, April 22, 1882, and the balance within one year from the date of the contract, April 8, 1882,—and the respondent was to convey to him by a good and sufficient warranty deed of release and quitclaim, free from all incumbrances, the said half lot. The covenants in the agreement were mutual and dependent; neither party could compel the other to perform until he had performed upon his part. The property was incumbered at the time, and the deed first prepared by respondent was incomplete, but the latter difficulty was remedied immediately after the suit was commenced, and the former would not probably have prevented an enforcement of the payment of the money in accordance with the terms of the contract, if the court could have so applied it as to discharge the incumbrances. But the contract only provided for the payment of \$1,500 at that time, which was entirely insufficient to pay off the first mortgage. The court decreed that the appellant pay the whole \$3,000, but it had no right to do that. There is no power known to the law that could compel it. The deferred payment of \$1,500 did not mature till April 8, 1883, nearly a year after the deed was required to be executed, and to compel the appellant to pay it at once imposed an obligation upon him he never stipulated to perform. He was to have a year in which to make that payment, without interest. The court, however, said he should pay it immediately, and this would not only be a hardship and loss, but it might be ruinous to a person of limited credit. Equity recognizes no such arbitrary authority as that. The great difficulty in the case arose out of the fact that the purchase price was inadequate to discharge the incumbrances. Had the \$1,500 to be paid in hand been applied to the discharge of the incumbrances, it would have left about \$300 still due and payable upon the first mortgage, and the second mortgage would have matured within a little more than a month thereafter; and when the second \$1,500 was to become due by the terms of the contract, it would not have been sufficient by about a hundred dollars, as the appellant's counsel figures it, to discharge both incumbrances. Courts of equity may be willing and anxious in such cases to give relief, although the literal and exact terms of the contract have not been complied with by the party who seeks their aid, but they certainly will not advance money for such party, nor impose a severe hardship upon his adversary party. It was the duty of the respondent to have attended to that matter before he called upon the appellant to pay the money. He had covenanted to give a deed to the land, free from incumbrances, though his counsel says he was only to *covenant* against incumbrances; but in either case good faith and fair dealing required that he should have paid off the incumbrances, or have reduced them to the amount of the purchase price to be paid for the land, and obtained such an extension of time for their payment that such purchase price would have discharged them when paid, in accordance with the terms of contract, before he began his suit.

The rule in *Hinckley v. Smith*, 51 N. Y. 21, is the correct one upon that subject. But the respondent's counsel claims that the appellant was cognizant of the fact of the incumbrances when he entered into the contract. The evidence is conflicting upon that subject; but suppose it preponderates in favor of the respondent, and that he only stipulated to give a deed containing a covenant against incumbrances, that would not relieve him from the obligation to convey a pure title to the property. His agreement to make a deed containing such a covenant was in effect an agreement that the property should be disincumbered. A covenant against incumbrance is an assurance that the property, at the time of the enrolling and delivery of the deed, is then free therefrom. That character of covenant is personal, and relates to the time of the execution of the conveyance, and is immediately broken if any incumbrance exists. The fact that the appellant knew of the existence of the mortgages may have been, as suggested by his counsel upon the argument, the reason and object of the stipulation in the agreement, that the respondent should give a deed free from all incumbrances. There is no pretense that the appellant assured the payment of the mortgages. The writing contradicts any intention of that kind. The respondent's counsel also claimed upon the argument that it did not appear that the full amount of the debts secured by the mortgages was unpaid, and that the burden of proof was on the appellant to show that it had not been paid; but it is enough to say, in answer to that position, that the allegations of the answer, averring that both of said mortgages were wholly unsatisfied, is not denied in the reply. Besides, the circuit judge who heard the case finds especially, in his fourth finding of fact, "that no part of either of said notes had been paid up to this date," which was June 19, 1884. I see no possible way to help the respondent out in this case. The difficulty is that he has not done equity. It would clearly be unjust to compel the appellant to accept the deed and pay the \$3,000, in the condition in which the property was on said twenty-second day of April, 1882, with reference to the said incumbrances. The pretended parol understanding between the parties at the time the agreement was entered into, in the most favorable light, is very inconclusive. If there had been any understanding that the purchase price was to be applied to the discharge of the said mortgages, it ought to have been pleaded; but even then it is quite doubtful whether the court could, in view of the fact that the bargain between the parties was in writing, have attached any importance to it. Chancellor KENT once said that a contract could not rest partly in writing and partly in parol, and the experience of mankind has shown that the rule is a very good one indeed. I am of the opinion that the decree appealed from should be reversed, and the complaint dismissed.

WALDO, J., absent.

(12 Or. 318)

STATE v. BECKER.

Filed June 8, 1885.

MISCONDUCT OF JURY—DRINKING INTOXICATING LIQUORS.
Question not one to be heard on appeal.

Appeal from Multnomah county.

Alyred F. Sears, for appellant.

John M. Gearin, Dist. Atty., for respondent.

By THE COURT. The appellant was convicted of the crime of arson. A motion was made for a new trial, on the ground that one of the jurors had drank intoxicating liquors during the trial, and also on the ground of the insufficiency of the evidence to justify the verdict. The motion was denied, hence this appeal. The questions raised are not the subject of an appeal, as has just been shown in the case of *Kearney v. Snodgrass*, ante, 309, and the authorities there cited.

(12 Or. 40)

BENEO and others v. YESLER and others.

Filed February 17, 1885.

LIFE INSURANCE—FOREIGN COMPANY—STATUTE OF WASHINGTON TERRITORY—
“DOING BUSINESS”—EFFECT OF ACCEPTING PROMISSORY NOTE BY INSURANCE AGENT.

The act of insuring a man's life in Washington Territory by a Kansas company, the name, etc., of the man being sent into the home office by the soliciting agent of the company, and the policy thereupon issued there and sent out to Seattle, would not be “doing business” within the meaning of the statute of Washington Territory, but the subsequent accepting by such agent from the assured of a promissory note in payment of premium, would be “doing business” within said meaning. THAYER, J., dissenting.

Appeal from Multnomah county.

W. B. Gilbert, for appellant.

Henry Ach, for respondent.

LORD, J. This was an action upon a promissory note made at Seattle, Washington Territory, to one A. B. Covalt, and assigned after due to the plaintiff.

The defense set up is that the note was made in payment of a premium on a life insurance held by the defendant Yesler in a Kansas life insurance company; that the company had an agent at Seattle, Washington Territory, who solicited the insurance in January, 1876, and the note in question was given in August, 1876, at Seattle, in payment of the second semi-annual premium on the policy, and that the note was void, for the reason that the said insurance company was a foreign insurance company, and had not complied with the laws of Washington Territory in regard to foreign insurance companies doing business in the territory.

It appears by the bill of exceptions that the said Covalt, mentioned in the note, and one Guion, were agents of Alliance Mutual Life Assurance Society, a corporation organized and existing under the laws of

the state of Kansas, and were engaged in soliciting life insurance for said company at Seattle, Washington Territory, and in making and taking applications therefor, and in collecting and receipting for premiums thereon. That in January, 1876, at Seattle, in said territory, the said Guion, as agent of said company, received the application of the defendant Yesler, together with \$671, the amount of the first premium, for which he gave the said Yesler a receipt, and then turned over said application, and the money so received, to the said Covalt, as agent of the said company, who forwarded the same to Leavenworth, Kansas, for examination and acceptance by the company. That the said company accepted the same, and thereupon issued a policy, which was sent by mail; whether to the defendant Yesler, or to their agent, Covalt, to deliver to Yesler, the evidence is conflicting. That when the second semi-annual premium of \$671 became due and payable on the said policy, in August, 1876, the said Covalt called upon the said Yesler for the payment of said premium, who, not having the requisite funds on hand at that time to pay the same, thereupon executed and delivered to the said Covalt the promissory note in question. That the said note was sent to the company, and retained by them until it became due and payable, and then forwarded to Seattle for collection; and, upon default of payment being made, the company charged the amount of the same to the account of the said Covalt.

Upon this state of facts the court below instructed the jury that the taking of this note was doing insurance business within the territory, and the result was a verdict and judgment for the defendant.

The contention of the plaintiff is that the taking of a promissory note in payment of a premium on an insurance policy is not "doing insurance business." Upon the facts as presented by this record, it would seem that the agent was not authorized to make a binding contract of insurance. As between him and the company, he was empowered to solicit and receive applications for insurance, and receipt for the premium money therefor, and to forward them to the company for their approval or rejection.

In *Armstrong v. State Ins. Co.* 61 Iowa, 215; S. C. 16 N. W. Rep. 94, it was held that the agent of an insurance company, who was authorized to take applications for insurance, and receive and receipt for premiums, and forward applications and premiums, and receive from the company policies of insurance when issued, and deliver them to the assured, that such agent had no powers or authority to bind the company by a contract of insurance. *Dickinson Co. v. Mississippi Valley Ins. Co.* 41 Iowa, 286; *Critchett v. American Ins. Co.* 53 Iowa, 404; S. C. 5 N. W. Rep. 543; *Ayres v. Hartford Ins. Co.* 17 Iowa, 176; *Reynolds v. Continental Ins. Co.* 36 Mich. 131; *Morse v. St. Paul F. & M. Ins. Co.* 21 Minn. 407.

When the defendant Yesler presented and delivered his application, and the premium money therefor, to the agent, to be by him forwarded to the company for its acceptance or rejection, he knew and

understood no policy of insurance would be issued unless the company accepted his application. Nor was any contract consummated until the application was accepted, and the policy duly issued.

The final act which made the transaction a binding contract upon the parties, was the acceptance of the application. Until this took place, it was a mere proposition tendered, to be accepted or rejected. The contract was consummated when the company acted upon the proposal and issued the policy, for then the minds of the parties had met and agreed. "What was before," says HARRIE, J., "a mere proposition, then became invested with the attributes of a contract, and from that time each party became bound for its performance. If this be so, the contracts are to be regarded as having been made when the company received and accepted the defendant's application, and issued and transmitted to him their policies." *Hyde v. Goodnow*, 3 N. Y. 270. It was, therefore, a contract of insurance made and executed in Kansas. *Lamb v. Bowser*, 7 Biss. 373; *Id.* 315; *Western v. Genesee M. Ins. Co.* 12 N. Y. 261; *Taylor v. Merchants' F. Ins. Co.* 9 How. 400.

Thus far the case stands clear. When the second annual premium became due on the policy of insurance, the agent called upon the defendant Yesler for its payment, and in lieu thereof, and under the circumstances already indicated, accepted the note in question. And the inquiry now arises whether the taking of the note was doing business in the territory. To undertake to give an exact definition to the word "business," which could be applied as a test or criterion in every case, would be an impossible test. It is said to be a word of large signification, and to denote the employment or occupation in which a person is engaged to procure a living. *Goddard v. Chaffee*, 2 Allen, 395; *Martin v. State*, 59 Ala. 36. Under a statute that any person who shall do any manner of labor, business, etc., shall be punished; etc., the loaning of money and taking a note therefor was held to be business within the meaning of such statute. *Troewert v. Decker*, 51 Wis. 46; S. C. 8 N. W. Rep. 26. In *Toule v. Larabee*, 26 Me. 466, it was held that a promissory note made on Sunday, for the price of a horse bought on that day, was void, as being in contravention of the statute prohibiting trade and business. In *Lovejoy v. Whipple*, 18 Vt. 376, the taking of a promissory note, executed upon Sunday, in consummation of a contract previously made, was considered business. "It thus seems," as said by THURMAN, J., "to be the common expression of the courts that the making of a contract is business within the meaning of these acts." *Bloom v. Richards*, 2 Ohio St. 388. It is the inhibition against doing business on this particular day against which these statutes are directed. It is not that the consideration is illegal or void, as against public policy, but it is the doing of a thing—the making of a contract—on a day when it is prohibited and unlawful, that vitiates the transaction and renders it void. The taking of a note for a loan or debt, or other consideration, is the

making of a contract, and is a transaction which signifies business in the sense of these statutes. The transaction is, in fact, the doing of business which, being prohibited on that particular day, is void.

The company was prohibited from doing business in the territory without compliance with its laws. This it had not done. It had effected an insurance, issued its policy, and the semi-annual premium was due. Was the taking of the note in question by the agent in payment of this premium the doing business in the territory? Was it a transaction which signifies the doing of business? Tested by the judicial interpretation applied to these statutes, the taking of the note was the making of a contract, which signifies the doing of business, and is within the prohibition of the law.

In *Smyth v. International Life Ins. Co.* 35 How. Pr. 128, the court held that the acceptance of yearly premiums upon outstanding policies, and of paying the losses thereon which may accrue, was doing business within the meaning of an act taxing all persons, who are not residents, doing business in the state. The issuing of policies, taking of premium notes, collecting or receiving cash premiums, and adjusting and paying losses, constitute the principal business of insurance companies. *Lamb v. Lamb*, 6 Biss. 425. Any or all of these acts, when they involve the making of a contract, import, at least, the doing of business, and if done within the territory, without compliance with its laws, are void. The taking of a note for premium money is as much the making of a contract as was the insurance policy. As such, either or both would denote a transaction which signifies business, and if done when or where prohibited would not constitute valid contracts. It is not material that the note was made payable to the agent. The consideration was for premium money due the company, and it was taken by the agent, in his capacity as such, for the benefit of the company. It was as agent for the company, and in its interests and for its benefit, that he transacted the business. He had no other or personal business or dealings with the defendant Yesler. In the person of its agent it was constructively present, making a contract or doing business in violation of the laws of the territory. This it could not do. To enforce, therefore, the payment of this note, would be, virtually, to disregard the plain provisions of the law, enacted to subserve wise and salutary purposes. *Pierce v. People*, 106 Ill. 18; Bliss, Life Ins. § 140.

"When the legislature prohibits an act," says Mr. Justice WALKER, "or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give to the person or corporation or individual the same right in enforcing prohibited contracts as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not

offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so, places the person who violates the law on an equal footing with those who strictly observe its requirements." *Cincinnati Mut. H. A. Co. v. Rosenthal*, 55 Ill. 91; *Bank of British Columbia v. Page*, 6 Or. 435; *In re Comstock*, 3 Sawy. 218.

As the note was transferred after it was due, it was open to the defense alleged, which, in our judgment, is well sustained. There was no error, and the judgment must be affirmed.

THAYER, J., *dissenting*. When this case was argued I was very much inclined to the opinion that soliciting and receiving applications for insurance in Washington Territory by an agent of a foreign insurance company, and forwarding them from there to the company, although the agent had no authority beyond the right to forward such applications to be examined and passed upon at the home office, would constitute the doing an insurance business within said territory, and be in violation of its statutes, unless complied with by the company; but the authorities collected by his honor, Judge LORD, and referred to in the opinion prepared by him in this case, have changed my preconceived notions upon the subject, and I concur in that opinion to the extent that the insurance upon the life of said H. S. Yesler by the Alliance Mutual Life Assurance Society was, as a matter of law, effected at the home office of said company, in the state of Kansas, notwithstanding the application therefor was solicited by the agent, Covalt, in Washington Territory, was made there, and forwarded by said agent from there. But I am not able to concur in the opinion that the taking the note sued on for a premium, when the insurance was lawfully effected, was doing business within the meaning of the law of Washington Territory. Nor, under the circumstances suggested, do I believe that the legislature of that territory intended, or could rightfully pass a statute that would render such an act unlawful. If the insurance was lawful, and the premium notes executed by Yesler were valid, I am unable to understand why the company had not the right to collect them, or to adjust the claim by taking Yesler's note, with an indorser, in payment thereof.

If Yesler had been residing in Kansas when the insurance was effected upon his life, and had personally made the application therefor at the home office of the company, had executed the premium notes there, received the policy there, and then emigrated from that state to Washington Territory, it could not be doubted but that the company, as a matter of course, would have had the right to forward those notes, and collect them of him at their maturity. And the right of the company stands upon the same footing in this case as it would have stood in the case supposed, and it would no more be doing business, within the meaning of the laws of Washington Territory, in the one case than in the other.

Yesler owed the company a lawful debt, and how could a territorial or state law be construed consistently so as to prevent its collection? If Yesler had been in possession of the tangible property of the company, and it had attempted to recover it from him in Washington Territory, would not that have been doing business there, just as much as its attempt to recover from him its chose in action would have been? In either case, it would have been an effort to obtain from him that which belonged to it legally, and I do not see how such an endeavor could be adjudged a violation of law.

The Washington Territory law certainly only intends that a foreign life insurance company shall not, except under the conditions it imposes, do its insurance business there. It would, to my mind, be unreasonable to suppose that any company of that character could not enforce a payment of lawful obligations due to it without any compliance with such conditions, and an action instituted in its courts would be doing business as much as receiving a promissory note from a debtor.

If an officer intrusted with the funds of the Alliance Company, at its home office in Kansas City, should run off with them, in violation of his trust, to Washington Territory, could not the company cause his arrest upon civil process, or receive indemnity for the injury, without filing in the office of the secretary of that territory a copy of its articles of incorporation, and appointing an agent as provided in said laws; and would such an attempt to arrest the defaulter, or to obtain satisfaction without suit, be "commencing to transact business in the territory," within the meaning of said laws? Such a requirement, imposed as a condition for doing such an act, would be strange comity. I fear that such a construction of the statutes of our neighboring territory would do injustice to the courtesy of its citizens. The language of the statute is:

"That all corporations now existing or hereafter formed under the laws of the states, etc., shall have full power and authority to sue and be sued, hold, purchase, and acquire, sell, lease, and dispose of, real and personal property, and generally to do and perform any and every act, and transact business within the [this] territory in the same manner and to the same extent as though said corporation had been organized under the laws of the [this] territory: provided, that any such corporation hereafter acquiring property or commencing to transact business in the territory shall first comply with the provisions of section 2 of this act."

The proviso, it will be seen, only extends to "acquiring property," and "commencing to transact business." Taking the note was not "acquiring property," as it was but a novation of a debt; nor was it the "commencing to transact business" within the meaning of the statute.

If the act had provided that no foreign lawyer should practice his profession in that territory without having first been admitted to its courts, it would not extend to the collection of a fee there, earned somewhere else; or that no foreign merchant should carry on business

there without a license, surely a merchant at Portland could sell a bill of goods to a Washington Territory citizen at Portland and send over his claim for collection without such a license. The territorial statute may be a wholesome provision of law, but I am at loss to understand why it should have such a latitudinarian construction as is attempted to be given it. The construction, doubtless, will operate as a great favor to Yesler. He owed a premium note. It was a legal claim against him. He took it up by giving the note in suit, and, although that has been put in circulation and credit been given it, yet, upon what appears to me to be a very flimsy reason, is enabled to repudiate it. Yesler received the full benefit of the note; the consideration was valid. Hackney & Beneo have, doubtlessly, parted with goods upon the faith of it; but the former says that his payment and discharge of his legal obligation was, under the laws of Washington Territory, an illegal act, and he is relieved from his liability.

In my opinion, if such a law existed, it would be "more honored in its breach than in its observance." I am in favor of a reversal of the judgment.

(12 Or. 362)

SMITH v. SHATTUCK, Adm'r.

Filed June 10, 1885.

1. EVIDENCE—ADMISSION OF TESTIMONY.

It is the custom of courts at *nisi prius*, and properly so, to receive in evidence legal documents in support of a defense, and afterwards instruct the jury as to their effect; and such a course on the part of said courts is no ground for reversal in a higher court, unless it appears that the rights of the opposite party have been prejudiced in consequence.

2. TAX DEED—DESCRIPTION OF THE PROPERTY.

A description of land in a tax deed is sufficiently certain if it is capable of being made certain.

Appeal from Multnomah county.

Killin & Moreland, for appellant.

James K. Kelly, for respondent.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Multnomah. The appellant commenced an action in said court to recover the possession of certain real property, consisting of a tract of $37\frac{1}{2}$ acres of land situated in said county of Multnomah. The complaint is in the usual form to recover the possession of real property. The respondent interposed several defenses, viz.:

First. That the land was owned by one I. B. Smith, and in his possession at the time of his death, September 3, 1882, and that the respondent was the administrator of the said Smith. *Second.* That on the thirteenth day of June, 1866, the land was sold by the sheriff of Multnomah county for taxes due from the appellant, which were delinquent, and was purchased at said tax sale by said I. B. Smith; that no redemption thereof having been had, a deed was duly executed by the sheriff of said county to the said I. B. Smith, on the third day of July, 1868; that said deed was duly recorded in the office of the clerk of said county, on the second day of November, 1870, since which time

the said I. B. Smith was in the actual possession of said tract of land until the time of his death; and that no action, suit, or proceeding for the recovery of said land was commenced within three years from the said second day of November, 1870, the time of recording the tax deed. *Third.* That neither the appellant, his ancestor, predecessor, or grantor, was seized or possessed of the premises within 10 years prior to the third day of September, 1882, when said I. B. Smith held and possessed the same adversely to the pretended title of the appellant for more than 10 years before the time of his death, under a claim of title in fee-simple.

The appellant filed a reply, in which he denied the several defenses set up by the respondent, and the issues so formed were tried by the court and a jury duly impaneled. The appellant, upon the trial, gave in evidence a deed executed by Gideon Tibbetts and wife to himself, dated March 24, 1858, of the land in controversy; also a patent from the United States to the said Gideon Tibbetts and wife, bearing date January 31, 1873, of a larger tract of land, and which included the land in dispute. The said deed to appellant contains full covenants of assurance, and the patent was issued under the Oregon donation law. The premises in question are a part of the said donation claim that inured under the said law to Mrs. Tibbetts. The respondent upon his part gave in evidence the tax deed alleged in his answer. When it was offered in evidence, counsel objected to its introduction upon the grounds that it was incompetent and immaterial, as it contained no sufficient description of the land. The description in the deed is as follows: "Thirty-seven and one-half acres of land in section 11, T. 1 S., R. 1 E., known as 'Smith's farm,' in Multnomah county, state of Oregon." The deed also contained a recital as follows: "The said property having been duly assessed for the fiscal year, 1865, to the said Y. A. Smith." When the objection was made to the introduction of this deed, the respondent's counsel stated to the court that he would show that in the month of June, 1866, said land was known as Smith's farm in the neighborhood where it is situated, and thereupon the court overruled the objection, and said deed was read in evidence to the jury.

Gideon Tibbetts, having been called as a witness, testified that he was very well acquainted with the land; that it was a part of the donation land claim of himself and wife; that his claim was in sections 10, 11, and 12, mostly in section 11, in the township and range aforesaid. The witness was then asked if he knew where a tract of land lies, described as "37½ acres of land in section 11, T. 1 S., R. 1 E., known as 'Smith's farm;'" to which he answered: "I know of a tract of that size that Smith pretended to own; he paid me for it; we always called it Mr. Smith's land,—that piece of ground." Said witness, in answer to another question asked by the respondent's counsel, testified: "This piece of land was known there as Smith's land, referring to June 6, 1866, and it is known to-day, I believe, as that. I have never heard of any other tract of land in that section that has been known as Smith's land, or as the Smith land." This evidence

was taken against the objection of appellant's counsel as being incompetent and immaterial; and there was no other evidence tending to show that the premises in controversy were in 1866, or at any other time, known as Smith's farm. Said witness also testified that as much as 15 years ago I. B. Smith, deceased, occupied a house which had been moved on the land in controversy for a school-house, but never used for such purpose; that I. B. Smith, deceased, slept in it and cooked there; and that some wood-choppers, cutting wood on the land in his employ, for a time slept there, and cooked their meals in it. He also testified that for the last five or six years of his life I. B. Smith resided on the land in controversy, in a small house built by himself, and had a small piece under cultivation. Another witness, John Campbell, testified that in 1878 or 1879, he, at the request of I. B. Smith, surveyed the land in controversy for him, and that he after that time, and until his death, resided upon it; and there was no other evidence tending to show adverse possession of the land in controversy by I. B. Smith. Respondent then offered in evidence a deed of Gideon Tibbetts and wife to Isaac B. Smith, dated the seventeenth day of March, 1874, for the land in controversy, to the introduction of which the appellant objected, because it was incompetent and irrelevant, which objection the court overruled, and allowed the respondent to read the same to the jury; to which ruling of the court the appellant then excepted. The respondent then rested, whereupon the appellant moved the court to strike out from the evidence the tax deed offered in evidence by the respondent, and to withdraw it from the jury; which motion the court overruled, and appellant excepted.

The respondent having rested, the appellant gave in evidence a certified copy of the assessment roll of said county of Multnomah for the assessment of taxes for the year 1865, and also a certified copy of the notice of said sale of said land for delinquent taxes, and then requested the court to direct the jury to find a verdict for the appellant, which the court refused. The said assessment roll and notice of sale contained the same description of the premises assessed and sold as the tax deed, except that the words, "known as Smith's farm," were not included therein. And thereupon the court proceeded to charge the jury; and, among other instructions, submitted the following:

"If you find the fact to be that there was in section 11, T. 1 S., R. 1 E., and on the donation land claim of Gideon Tibbetts, a parcel of land conforming in size and shape to the land in controversy, and known in the year 1866, about July of that year, as 'Smith's farm,' and that there was no other similar piece of land in that section that was so known, then your verdict should be for defendant."

To the giving of this instruction the appellant then excepted, because there was no evidence tending to show that in 1866, or at any other time, the land in controversy had been known as "Smith's farm." The court then, at the request of the respondent, submitted

to the jury the special question: "How long, if for any time, was Isaac B. Smith, deceased, in the actual possession and a resident upon the land in controversy?"—and asked the jury to find a special verdict upon the said question; to the submission of which special finding the appellant objected, because it was incompetent and immaterial, and because there was no evidence tending to show that there had been any adverse possession of said lands before the commencement of this action. A general verdict was rendered for the defendant, and the special finding was answered, "Since 1869." The appellant filed a motion to set aside the general verdict, and also to set aside the special verdict, both of which were refused by the court, and the judgment appealed from was entered.

The questions presented for the consideration of this court are: the admission in evidence of the tax deed, and the deed from Tibbetts and wife to I. B. Smith, of March 17, 1874; the refusal of the court to strike out from the evidence the tax deed; the refusal to direct for the appellant; giving the instruction excepted to by the appellant; submitting the special matter to the jury; and in refusing the motion to set aside the special and general verdicts. There was certainly no error in submitting the two deeds in evidence. They were relevant and pertinent to the issues, and the court should not have been compelled to stop at that stage of the proceeding to consider their effect, whatever might have been its final conclusion as to their materiality. The respondent had in his answer alleged title to the premises in I. B. Smith, and set up as another defense the statute of limitations. He had a right, therefore, to give in evidence any proof that tended to establish either defense. It is the usual practice of courts at *nisi prius* to receive such proofs in the first instance, and afterwards instruct the jury as to their effect. This is the more prudent course, and an appellate court would not be justified in reversing a judgment upon such ground unless it could plainly perceive that the rights of the opposite party had been prejudiced in consequence thereof. Nor could the circuit court have properly stricken out from the evidence the said tax deed, even if its description of the premises were imperfect. It was still admissible to show that said I. B. Smith was holding under color of title. It was competent evidence, in connection with proof of possession, in order to establish the defense of the statute of limitations. *Pillow v. Roberts*, 18 How. 477; *Wright v. Mattison*, 18 How. 50.

The request of the appellant that the court direct a verdict in his favor was properly overruled. The court had no such power over the jury as that. It had no right except to state to them "all matters of law which it thought necessary for their information in giving their verdict." It had no authority to present the facts in the case, and was required to inform the jury that they were the exclusive judges of all questions of fact. Civil Code, § 198. The appellant had a right, when the evidence was closed, to submit in distinct and con-

cise propositions the conclusions of fact which he claimed to have been established, or the conclusions of law which he desired to be adjudged, or both. The conclusions of law would, of course, have been decided by the court; but the conclusions of fact would have had to have been submitted to the jury. Civil Code, §§ 237, 238, 239. The court had the right, undoubtedly, to inform the jury as to what it was necessary for the respondent to prove, in order to establish his defenses; and if there were no evidence, or it were not sufficient to make out any of the defenses, and the jury decided wrong, the court should have set their verdict aside. A jury may err in their decision, may conclude that a party has maintained a defense when he has not, but the law does not presume they will do so, any more than it will presume that a court will mistake the law. In the event they do, however, it can be corrected without the court having to get into the jury-box. The province of a jury is as certain and sacred under our law as that of the court, and the functions of the former can no more be usurped than those of the latter. The appellants could not have expected the court would set aside the verdict, unless it concluded that its charge to the jury, before referred to, were erroneous. The court told the jury, in the charge, that if they found that there was in said section, township, and range, and in the donation claim of said Tibbetts, a parcel of land conformable to that in controversy, and known as "Smith's farm," at the time referred to by the court, and that there was no similar piece of land in that section so known, their verdict should be for the respondent; and as the jury returned a verdict for the respondent, it is quite probable they found such fact. The court could not, in view of that instruction, have consistently set the verdict aside. Nor can this court conclude that there was error in denying said motion, without determining that there was error in the said instruction.

The question submitted by the court for the special finding of the jury was of very little importance. The answer returned by them was entirely inconclusive in itself to establish the defense of statute of limitations. The length of time Isaac B. Smith was in the actual possession of and a resident upon the land in controversy was entirely immaterial, unless he was holding during the time adversely to the appellant. It was claimed by the respondent's counsel, upon the argument, that the fact that Isaac B. Smith purchased the premises at the tax sale, and put the deed upon record, was evidence that his holding was as an owner. However that may be, neither the question, nor finding of the jury in answer thereto, injured the appellant, and is of no advantage to the respondent on the appeal, as it does not appear that the general verdict was rendered upon the defense that the appellant had not been seized or possessed of the premises within the period of 10 years. It is likely to have been rendered under the instruction as to the effect of the tax deed, or upon the three-years limitation, or upon the other defense. The consequence, therefore, is

that the respondent must maintain the correctness of the said instruction, to prevent a reversal of the judgment. And if it be correct, then the appellant's other points fall to the ground, as that is the sum of all the alleged errors in the case.

After a very thorough consideration of the instruction relating to the effect of said tax deed, in case the jury found that there was a parcel of land answering to the description contained in it, we have concluded that the circuit court properly gave it. The evidence to support such a finding was very slight and unsatisfactory; but when there is any evidence, however meager, calculated to prove any fact in a case, it becomes the province of the jury to weigh it and determine its effect; and whatever may be our view as to the correctness of the determination, we have no right, under our system of procedure, to reverse a judgment in consequence of an instruction to the jury that if they find a certain fact they should find a verdict in a certain way, when the fact would authorize such a finding or conclusion, and there is evidence in the case which fairly tends to support it. The description in the tax deed is sufficiently certain upon its face,—that is, it was capable of being made certain, if the land therein described could be ascertained; and the evidence upon that point, heretofore referred to, showed, in the opinion of the court, a case sufficient to be submitted to the jury.

The counsel for the appellant contended, upon the argument, that the land in question had no such notoriety as would justify any reference to it by name as descriptive of it. It is probably true that it was not extensively known by any name. But it consisted of 37½ acres situated in the city of East Portland, was a part of a certain donation land claim, several deeds to it had been executed, the said I. B. Smith had moved onto it some 15 years previous, had since then had it surveyed, and for five or six years prior to his death had lived upon and cultivated it. There could have been, under the circumstances, no mistake as to the identity of the land assessed and sold for taxes. The people in that vicinity unquestionably were acquainted with it, and well knew, as a matter of fact, what piece of land was intended from the advertisement of the delinquent tax-list and the sheriff's deed. The case is by no means free from doubt, but it comes here upon the finding of a jury upon the question involved, and after the court who tried the case has refused to set the finding aside.

The judgment will therefore be affirmed.

(12 Or. 353)

WILSON and others v. WELCH and others.

Filed June 10, 1885.

RIPARIAN RIGHTS—POWERS OF THE STATE.

The state cannot convey to any but a riparian property holder any part of a navigable stream between high and low water mark.

Appeal from Clatsop county.

Sidney Dell, for respondents.

E. C. Bronough, for appellants.

THAYER, J. This appeal is from the circuit court for the county of Clatsop, rendered in a suit commenced by the respondents against the appellants to declare a trust in favor of the former in certain tide-lands formerly conveyed by the state of Oregon to James Welch, ancestor of the appellants. The respondents alleged in their complaint in the suit that said James Welch procured said deed from the board of commissioners for the sale of school lands, etc., on the eighteenth day of September, 1876; that in his application for the purchase thereof he fraudulently represented that he was the owner of block 11, in the town of Astoria, which abuts upon said tide-land, when in truth said block did not belong to him; that he and one Shively had, by deed bearing date June 3, 1846, conveyed it to John Wilson, ancestor of the respondents, and that the latter owned it at the time said application was made, and that no notice of any kind was given to him, or to any one, by said Welch or said board, nor by any person, of the application; that both James Welch and John Wilson had since died, and that the appellants and respondents are their respective representatives and successors in interest,—the respondent Ann R. Wilson being widow of the said John Wilson, and the said Mary E. Wakeman, a daughter; that the former owns a dower right in said block 11, and the latter owns the remainder.

The respondents further alleged that on August 29, 1877, they commenced an action against the appellants to recover the possession of said block 11, and that on March 27, 1878, they recovered a judgment against them, whereby it was adjudged that said John Wilson was the owner in fee of said block by virtue of said deed of June 3, 1846, until his death, and that they then became the owners thereof as mentioned, and entitled to the possession. They alleged, also, that they did not know the exact amount of purchase price paid by James Welch to the state of Oregon for said tide-lands, but offered to pay the same when ascertained by the court. The appellants denied that said James Welch procured the deed from the state to the tide-land by the representation alleged; denied that said block 11 abutted or fronted on the shore of the Columbia river; claimed that on said thirtieth day of June, 1846, it was above ordinary high-water mark, but that since said time the water had gradually encroached upon the bank of the river, upon the north side of said block, and that the line of ordinary high tide had moved south until it then reached the north boundary

thereof; that by said deed the said block thereby intended to be conveyed is bounded by metes and bounds, and the number and size of the lots expressly given, and that the deed was made solely with reference to said parcel of land as a platted block, and the parties intended it should not extend further on the north than the street known as "Wall Street," but which was by mistake designated in said 'deed as "Water Street," which lies in front of the block, and between it and said tide-land; that in front of the block is a strip of land included within said street which was above ordinary high tide, and in front of the strip and of the street was a tide-flat, extending for a distance of 700 feet, susceptible of being easily reclaimed, which flat, at the date of the purchase of the block by said John Wilson, was of great value; that from the north side of the flat it was 600 feet to the ship channel of the Columbia river, and that said space was valuable for wharfage purposes, and at the date of the deed was worth several thousand dollars; that it had been duly platted and laid off into lots and blocks, with streets extending through the same, which fact said Wilson well knew at the time he purchased block 11; that about 1845 said James Welch bought of said Shively all his right and property as riparian proprietor of the tide-land in controversy; that the appellants had succeeded to his rights, and that they and said James Welch, for more than 30 years, had paid taxes on the land as their private property, and had paid \$1,000 for street improvements.

These facts were in the main denied by the respondents in their reply. The proofs in the case show that said Shively, some time prior to the year 1846, settled upon a tract of land including said block 11; that he conveyed an undivided half of it to said James Welch; that they surveyed and laid off a part of it into lots and blocks; that Welch gave to Shively a power of attorney; that said Shively executed the deed for himself and said Welch to the said John Wilson, of June 3, 1846, to said block 11; that after the passage of the donation act of September 27, 1850, the said Shively, after taking back a deed from Welch of the undivided half interest, entered the said tract of land as a donation claim, and subsequently, and in the year 1860, obtained a patent to it; that after his entry and compliance with the provisions of that act, said Shively reconveyed to said Welch a portion of the claim in severalty, which conveyance included said block 11. The deed to Wilson of June 3, 1846, purports to convey a parcel of land in the town of Astoria, described as being a part of the settlement rights of said Shively, on which he had laid out and surveyed said town, and which premises consisted of lots numbered from 1 to 12, inclusive, forming block 11, which it describes as being bounded north by Water street, east by Spence street, south by West First street, and west by Pine street, which lots it states were each 50 feet front by 142½ feet back; reference being had to the plat of said town of Astoria, so laid out as before mentioned, which plat had then been lithographed by E. & J. Ihltawa, of St. Louis, Missouri.

The deed also contains a covenant to have said plat recorded as soon as there should be an office provided by law for that purpose. It also contains a covenant that the grantors will forever warrant and defend the fee-simple title to the premises, free from the claims of all persons whatever; also that the grantors, their heirs, executors, and administrators, will, at the expense of the grantee, his heirs or assigns, make a new and further deed, if the same should be required to vest a fee-simple title, when they, or either of them, shall demand the same. The deed was not acknowledged or proved so as to entitle the same to record until March, 1876, and was recorded in the office of the clerk of the county of Clatsop in April of that year.

It further appeared in proof that said James Welch did base his right to purchase said tide-land, when he made said application to purchase, upon the ground that he was the owner of said block 11, upon which it abutted at that time; and it further appears that at said time, and for a long time prior thereto, he had claimed to be the owner thereof, and that the appellants continued to claim such ownership until the affirmance of the judgment by this court recovered against them as before mentioned. Proof was also given tending to show that there had been a narrow strip of highland adjoining said block 11 on the north, within the street called "Water Street," but that it had been carried away by the action of the water; but at what date it disappeared is not shown.

The land in controversy includes less than half an acre. It was purchased by said James Welch of said board of commissioners under the provisions of the act of the legislative assembly of the state to provide for the sale of tide and overflowed lands on the sea shore and coast, approved October 28, 1872, as amended in 1874. That act provides that the owner of any land abutting, fronting, or bounded by the shore of any bay, harbor, or inlet on the sea-coast, shall have the right to purchase from the state all the tide-land belonging to the state in front of such owner or owners, subject to certain provisos which allow the owner of improvements upon such tide-lands to purchase the lands so improved for a certain period, and also allow outside parties to become such purchasers in case the owner or owners of the highland fail to make application for the purchase of the same for three years; but in the latter case, the board of commissioners for the sale of such lands must give the owner or owners of the highland, having the preference in the purchase thereof, notice of such application to purchase the same, who thereupon have 60 days after the notice is given, in which to make application to purchase it. It was conceded in this case that the said board of commissioners gave no such notice to said John Wilson or the respondents.

The appellants' counsel claims that if a strip of highland did exist north of block 11 on June 3, 1846, so that the wharf privileges remained in Shively and Welch after the execution and delivery of the deed of that date, such right, and, as he claims, the consequent right

to purchase the tide-lands in front of that strip, would not be divested out of Welch and vested in Wilson by the act of the washing away of such strip of land before the passage of the said act. He also claims that the effect of the descriptive part of said deed, in which the lots in said block are conveyed by number and dimension, respectively, and then the block bounded specifically by streets between which it lies, is sufficient and conclusive evidence that it was the intention of the grantors to limit the grant to the land contained within the exterior boundary lines of the block, and to reserve the wharf rights and privileges between the north line of said Water street and the ship channel. The decision of this court in *Wilson v. Shiveley*, 4 PAC. REP. 324, at the March term, 1884, was adverse to the points raised by the counsel; still, as I view the question, they are very important matters. A shore-owner upon tide-waters, or upon a navigable stream, possesses rights which, of late, are conceded to be property. *Yates v. Milwaukee*, 10 Wall. 497. They are not rights, as has often been supposed, that were derived from the state, though held and enjoyed in subordination to the rights of the public. *Dalaplaine v. Chicago & N. W. Ry. Co.* 42 Wis. 214; *Lorman v. Benson*, 8 Mich. 18.

The embarrassing feature of this subject has arisen out of a misunderstanding of the nature of the state's ownership of land between high and low water upon navigable streams. It has been spoken of as an ownership in fee, and an erroneous impression has been conveyed. The state does own the channel of the navigable river within its boundaries, and the shore of its bays, harbors, and inlets between high and low water, but its ownership is a trust for the public. It has no such proprietorship in them as it has in its property and public buildings. It cannot sell them so as to deprive the public of their enjoyment, (*Steam-engine Co. v. Steam-ship Co.* 12 R. I. 348;) nor can it take away riparian rights, except for public use, and by giving just compensation. Gould, Waters, § 150. The New York courts have taken a different view, and which has been followed by an Iowa decision, (*Tomlin v. Dubuque, etc., R. Co.* 32 Iowa, 106;) but it is repudiated by the federal and most of the state tribunals. If, then, the riparian rights referred to, such as wharfage privileges, are property, they may be sold, or reserved to the owner of highland upon which the tide-land abuts. There is no reservation in terms in the deed of June 3, 1846, but if the riparian rights belonging to Shively and Welch were not conveyed, which was the case if there was a strip of highland between said block 11 and the tide-land in question not conveyed by the deed, they necessarily remained in them, and I do not see how they could be divested out of them without their consent, unless such rights are held to be inseparable from the upland. But that would not be consistent with the holding in *Parker v. Rogers*, 8 Or. 189.

Too much importance, I apprehend, has been attached to the tide-land act before referred to. I seriously doubt whether that act con-

fers any new right upon the shore-owner in such cases, although he has purchased the land in front of him in accordance with its terms. The title he obtains is subordinate to the public right of passage and navigation, and he had the same wharfage privileges before as afterwards, and the right to protect his uplands from the encroachments of the sea. According to Hale there are three sorts of rights in ports and shores: *First*, the *jus privatum*, or right of property or franchise; *second*, the *jus publicum*, or public right of passage and navigation; and, *third*, the *jus regium*, or governmental right. The state could not, by any sale of the shore of a body of water below high tide, deprive itself of the latter right; nor, as before suggested, could it thereby deprive the public of the right of passage or navigation. What, then, can such a sale of that character of tide-land amount to? I doubt very much whether a sale in such a case could be made to an outside party that would deprive the riparian owner of any right to the enjoyment of the land.

It was held in the case of *People v. Cowell*, 60 Cal. 400, that lands within the flow of ordinary tides, the cost of reclaiming which would greatly exceed their value when reclaimed for any agricultural purpose, were not acquirable under a statute authorizing a sale of reclaimable lands. The state might authorize a sale, doubtless, of tide-flats, and the purchaser have the right to reclaim them and devote them to private use, where no right of public passage or navigation is infringed; but to attempt to sell a part of the channel of a navigable stream below any ordinary stage of high water, occasioned either by tides or freshets, is absurd. But if I am mistaken in this view, and the state has an absolute ownership in such cases, as some of the authorities would seem to indicate, how can the respondents maintain their suit to declare a trust in their favor in the land in controversy? They, nor their ancestors, never owned it legally nor equitably. Conceding their ownership of block 11, and that the tide-land abutted upon it, that certainly gave them no ownership of the latter, if the title was in the state. The act of 1872 graciously gave them, in that case, a preference in the purchase, but it prescribed conditions upon which the purchase can only be made. The respondents do not allege or show that they have ever attempted to comply with these conditions. It may be inferred that they consider the purchase by Welch, based upon his claim to be the owner of said block 11, made it unnecessary for them to apply; but how does the court know that they would have purchased the land if Welch had not? The act provides for a regular sale of such lands. Section 3 says that the applicant shall, with his application, present to the officer or officers who are or shall be authorized to sell such lands, evidence of his title to land which abuts, etc., upon such tide-land; and section 4 says that the value of such tide-lands shall be appraised at a certain sum per acre, which shall not be less than \$1.25 for each acre of such land: provided, that the board having in charge the sale of

such lands shall have power to set aside any appraisement on evidence taken of the true value of the same, and shall make another and true appraisement, based on such evidence.

The act did not contemplate that the applicant should get the land for less than its true value in any case, and the legal privilege in favor of the shore-owner was merely to buy the land for what it was actually worth. In such cases many shore-owners might not be inclined to attempt to make such purchase. Whether the respondents would have been so disposed is left entirely to conjecture; and yet they now claim that Welch's title should inure to their benefit. I can readily understand that where one has the equitable title to real property, the legal title to which is outstanding, and another person wrongfully buys in such legal title, a court of equity could decree that the legal title so purchased should inure to the benefit of the equitable owner. To grant such relief, however, in favor of one who never had the equitable title,—who had merely an option to purchase the property upon such terms as might be agreed upon with the owner, and who had never proposed to make the purchase, or indicated any intention of that character,—would be carrying the doctrine to an unjustifiable extent. I think the respondent's remedy in this case, under the theory that the state had the absolute title to the property in question, and had conveyed it to James Welch, was to have the state commence an action for the purpose of vacating the patent or deed executed to him, as provided in section 355 of the Civil Code; and when a judgment has been obtained annulling it, make their application for the purchase of the land.

But, as before suggested, I do not think the sale affected the rights of the owners of the land upon which the tide-land abutted. The main question in the case, as I regard it, is to whom these rights belonged. If, by the terms of the deed of June 3, 1846, from Shively and Welch to John Wilson, they were reserved to the former, then they are rightfully in the appellants; but if no such reservation was made in that instrument, then the respondents succeeded to them whenever they became shore-owners. The rights which attached to the narrow strip, which counsel for the appellants claims was not conveyed by the deed, and which existed as a mere incident of that parcel of land, were lost, when it was washed away. The courts have usually held, where the question has arisen, that where a lot or block is bounded in a deed by a street, the deed operates to convey the land to the center of the street. Under such a construction it is quite evident that the deed of June 3, 1846, conveyed the highland adjacent to and on the north side of said block 11. I am informed that this court has so ruled, and I must consider that ruling as decisive of the question. But if the deed referred to showed an evident intent to reserve the said riparian rights to the grantors, they and their successors should be adjudged the owners thereof. In *Codman v. Winslow*, 10 Mass. 149, it was held that a deed to a tract of land bounded

on a street or way would not be construed as extending across the street or way so as to include other lands and flats below high-water mark. Such a construction might have been applied in this case if the said grantors had owned the land below high-water mark. But where the right to the latter land is only incidental to the ownership of the highland, I think it would not be separated therefrom without a special reservation in such grant, and I am unable to discover any such reservation in the deed of June 3, 1846. Besides, Welch himself does not seem to have supposed that his right to purchase from the state arose out of any such reservation, as he based it upon his alleged ownership of block 11. I am of the opinion, therefore, that the equities are with the respondents, and that they should have a decree enjoining the appellants from interfering with their riparian rights in front of said block under and by virtue of said deed from the state, which is the extent of the relief I think they are entitled to, and that neither party should recover costs.

WALDO, C. J., and LORD, J., concur in the result, but upon different grounds.

(12 Or. 335)

MANAUDAS v. HEILNER and others.

Filed June 10, 1885.

CONVEYANCE—EFFECT OF.

Review of facts in the case, and thereupon decree affirmed, with a modification

Appeal from Baker county.

E. O. Stearns and Bonham Ramsey, for appellants.

E. R. McArthur, for respondent.

THAYER, J. This appeal is from a decree of the circuit court for the county of Wasco, rendered in a suit commenced by the respondent against the appellants, originally, in the county of Baker. The venue was changed, to suit the convenience of the parties, to said county of Wasco. The suit was to compel an accounting, and to decree a recovery of certain real and personal property from appellants to the respondent. It appears, from the proofs and pleadings in the case, that the appellants, for some time past, have been engaged in merchandising in the county of Baker, and that the respondent has been engaged in mining there; that the respondent some years ago opened an account with appellants, and with other mercantile firms doing business in that county, with which the appellants had partnership connections; that on the twenty-sixth day of March, 1878, the respondent was indebted to appellants on account in the sum of \$1,981, and thereupon made an absolute transfer to them of a large amount of real and personal property, consisting of mining claims, flumes, etc.; also a lot in Baker City, in said county, and certain personal property; and that on the twenty-seventh day of March, 1878,

said appellants and respondent entered into a written agreement relating to the said transfer of said property, and which evidently was a part of that transaction, of which agreement the following is a copy:

"This agreement, made this twenty-seventh day of March, 1878, between S. A. Heilner and E. D. Cohn, of Baker county, Oregon, and Joseph Mandaudas, of the same place, witnesseth: That whereas, on March 26, 1878, said Mandaudas sold and conveyed by bill of sale, for consideration mentioned of \$1,000, to said Heilner & Cohn, a large number of placer mining claims, flumes, structures, house on claims, blacksmith tools and appurtenances, stock, cattle, and horses, known as the Leatherwood mining and other property, situated on Quartz gulch, and other places in Shasta and Willow Creek mining district, in Baker county, Oregon; and also conveyed, by deed executed by himself, certain ditches and water-rights, flumes, and property to said Heilner & Cohn, for consideration mentioned at \$561, at same date, said ditches and water-right property being known as the Leatherwood ditch and water-right property, in and about said Shasta mining district, in said county and state, said property and bill of sale and deed being of record in clerk's office in Baker county, Oregon.

"And whereas, on said date, one Peter Mann, for consideration of \$325 expressed, executed his deed to said Heilner & Cohn for lot 2, in block 2, of Fisher's addition to Baker City, Oregon, with tenements and appurtenances, which deed is of record in said county, said considerations being debts for the most part of said Mandaudas, assumed, paid, and settled by the said Heilner & Cohn for the said Mandaudas, amounting in the aggregate to \$1,886 and interest, amounting to \$95; total, \$1,982.

"Now, therefore, it is agreed by and between the parties that, if the said Mandaudas shall repay the said amount of \$1,980 in gold coin to the said Heilner & Cohn, with 12 per cent. per annum interest thereon, from date hereof, in manner and form as follows, to-wit, on or before January 1, 1880; and said Mandaudas promises to pay the said sum from and out of the gold extracted and cleaned up from the working of the said mines, or part thereof, so conveyed to said Heilner & Cohn, and hereinafter let to said Mandaudas, who hereby covenants to work some part of said mines, or all that may be practically or profitably worked, at his own expense in all things, in workman-like manner, with diligence, economy, and dispatch, to the end that said payment of said sum may be made as early as possible before the said date. And in consideration of the premises, and one dollar to them paid by said Mandaudas, the said Heilner & Cohn let the said mines, mining property, ditches, water-rights, and interests to the said Mandaudas for the term of two years, to be worked and operated by him at his own expense, in a workman-like manner, according to the customs, laws, and usages of said mining district, and of the state and of the United States, to the end that the title thereto shall be protected from forfeiture, and at every clean-up the net proceeds of gold extracted from the working of said mines shall be immediately paid over to said Heilner & Cohn, to be applied by them towards payment of said sum until said sum is fully paid; and when so paid, or if paid in any other manner by said Mandaudas before said January, 1880, that then said Heilner & Cohn agree to reconvey all the said property to the said Joseph Mandaudas, or such right or title as they may then have therein.

"And it is agreed by parties herein that in case of the failure of the said Mandaudas to pay the said sum, or make substantial default herein, that then said deeds and bill of sale shall become absolute at the option of said Heilner & Cohn, who may enter and take peaceable possession thereof from the said Mandaudas, and sell and dispose of the same as they may deem best."

It appears that after the execution of the above agreement the said respondent continued to deal with the said appellants, and with other firms with which they were connected in business, and purchased from them goods, wares, and merchandise, and they advanced him money and paid money at his request, and for his use, and that respondent in return paid to appellants gold-dust and money; that they continued their mutual dealings until some time in July, in the year 1880, when the appellants, with the knowledge and consent of the respondent, entered into a written agreement with one W. B. Benson in regard to certain of the property transferred to them by the respondent, and referred to in their said agreement of March 27, 1878, before set out. The latter agreement is as follows:

"This agreement, made and entered into the ——— day of July, 1880, between S. A. Heilner and E. D. Cohn, of Baker City, the parties of the first part, and W. B. Benson, of the same place, the party of the second part, witnesseth: That the parties of the first part, in consideration of the covenants and agreements on the part of the said party of the second part, hereinafter contained, agree to sell unto the said party of the second part the following described placer mining ground, and water-rights and ditch property, situate in Shasta mining district, Baker county, Oregon, to-wit, [here follows lengthy description of the property,] for the sum of eight thousand dollars, and the said party of the second part, in consideration of the premises, agrees to pay to the said parties of the first part the said sum of eight thousand dollars, in manner following, to-wit, one thousand on the execution of these presents, and as to the other payments the party of the second part agrees to take possession of said mining property, and with a sufficient force of men diligently work the same in a skillful and proper manner, during the mining seasons when water can be purchased or had at the rate of 12½ cents per inch, and with a sufficient amount of water to work to advantage, when it can be had, and first work up through the Campbell ground, and then otherwise, to the best advantage, to extract, wash out, and clean up the gold contained in said mining ground, and at each clean-up hereafter the said party of the second part agrees to pay over and deliver, in good, clean gold-dust, one-third of the gross proceeds of all gold so washed out, extracted, and cleaned up, without delay, as soon as so cleaned up; and out of the remaining two-thirds of each clean-up of gold so made hereafter, after deducting all expenses of working said claims during the run, then to pay over and deliver to the parties of the first part whatever gold-dust may remain of such clean-up, and the said gold-dust so paid over and delivered to the parties of the first part at such time of each clean-up, shall be applied and credited on this agreement, as a part payment of said purchase money, at the rate of seventeen dollars per ounce, until the balance of said purchase money is fully paid.

"And the party of the second part also agrees that out of all the gold-dust extracted and cleaned up out of any drift dirt, the full one-half thereof, when so extracted, washed out, and cleaned up, shall be immediately paid over and delivered to the said parties of the first part, and applied and credited on this agreement as a part payment of said purchase money, until the same is fully paid. And the party of the second part fully agrees to keep an account of all the gold-dust washed out, extracted, and cleaned up in the working of said mining ground by the use of said Birch creek water, used for working said claims in the spring, and to use the same therefor to the best advantage each spring; and out of the gross proceeds of all gold-dust cleaned up by use of said water, to pay over, at the close of the Birch creek water season, the full one-half of such gross proceeds to the said parties of the first part, to be ap-

plied as a part payment on the purchase money of this agreement, until the balance remaining due is fully paid. And the said party of the second part agrees to notify said parties of the first part of the time or times of each and every clean-up of said mining claims so worked, and permit them or their agents to be present to witness such clean-up. And the said parties of the first part agree to deliver immediate possession of said premises to the party of the second part, to the end that the said mining ground may be so worked, and the balance of said purchase money of \$8,000 so paid from such proceeds of gold extracted therefrom, and from such water rights and ditches in manner aforesaid.

"And the parties of the first part also agree that on receiving the said sum of \$8,000, at the times and in the manner above mentioned, or if paid otherwise or sooner by the said party of the second part, they will execute and deliver to the said party of the second part, at their own proper cost, a good conveyance of all their right, title, and interest in and to all said property. It is further agreed and understood by the parties hereto that should the party of the second part make default in any substantial particular in the performance of his part of this agreement, that then the parties of the second part may, at their option, re-enter and take possession of said premises and terminate this agreement, and the party of the second part shall forfeit all right to a conveyance of said property, and all right of possession thereof, and of the purchase money paid thereon, as damages for such default in the performance of his part of this agreement; and it is understood that the stipulations aforesaid are to apply to and bind the heirs, administrators, and assigns of the respective parties; and it is further agreed by the said party of the second part that he shall not sell, assign, mortgage, or pledge his interest in this agreement, or in said property, or any part thereof, or deliver possession thereof, to any person or persons other than the parties of the second, except by permission of the parties of the first, part. And it is further understood that this agreement is to sell all the mining claims and property situate in and adjacent to Quartz gulch, heretofore sold by W. J. Leatherwood to Joseph Manaudas, and by John Campbell to said Manaudas; that all erasures and interlineations herein were made before execution thereof.

"In witness whereof, the parties of the first part hereto set their hands and seals, and the said party of the second part also sets his hand and seal, the day and date first above written.

S. A. HEILNER & Co. [Seal.]
 "W. B. BENSON [Seal.]

"In presence of—JOS. MANAUDAS.
 "HERMAN HAAS."

It appears, also, that the respondent occupied and worked the mining ground referred to in said last-mentioned agreement, until the time of the execution of the said agreement, when it was turned over to the said Benson, and thereupon he began working it in accordance with the terms thereof. It further appears that some time in May, 1879, a suit was commenced in the circuit court for said county of Baker, by one James Lynn, against the appellants, respondent, and a ditch company, consisting of Packwood & Carter, to restrain them from running what is termed "tailings" onto Lynn's mining ground, by running water from the ditch of said Packwood & Carter down through certain flumes of said Lynn, said water supplying said mines referred to in the said written agreement with said Benson; that said suit involved a large expense in procuring witnesses, and on account of attorney's and referee's fees, and other incidental expenses; that it

continued pending until the March term, 1880, of said circuit court, when it was heard; and on the fourth day of August of that year a final decree was entered therein, and each party required to pay one-half the costs and disbursements of the suit, including the fees of the referee and commissioner appointed to execute the decree. A controversy arose in regard to the taxation of the costs and disbursements, and they were not adjusted till July, 1881, at which time they were adjusted by the court upon appeal from the decision of the clerk in the taxation thereof. It further appears that on the fifteenth day of December, 1880, the respondent and appellants had a settlement of their affairs; that appellants brought forward an account for general merchandise furnished the former, and of money advanced and paid for him, and also accounts of the other firms before referred to, and which accounts contained credits in favor of the respondent for gold-dust and money received from him, also from the proceeds of the mine under the management of said Benson; that in said settlement there was included said accounts of the appellants and the credits of the respondent; and that in the adjustment there was found due from the respondent to appellants the sum of \$453. At that time the respondent was about to make a visit to France, and he borrowed from the appellants, through Mr. Cohn, one of the members of the firm, \$547, and executed to Cohn, for said firm, his promissory note for \$1,000, covering the balance of the account and the borrowed money. It further appears that Benson, when he entered into the agreement with the appellants, of July, 1880, did not pay the thousand dollars therein agreed to be paid on the execution thereof, but that he executed his promissory note therefor to Heilner, one of said firm, and Mr. Cohn, the other member thereof, indorsed it. Said note was never paid, but is still in the hands of appellants. And it further appears that the appellant paid certain of the costs and expenses of said suit brought by Linn, and claims to have paid the following items and to the following-named persons, on account of said suit, and that they are entitled to charge the respondent with the amount, viz.: To I. D. Haines, \$300; to I. B. Bowen, \$172.50; to Grier & Kellogg, \$117; to Mrs. Howard, \$27; to John Fenman, \$8; to S. H. McLaughlin, \$145; to I. B. Bowen, \$87.25; to Joseph Shinn, (referee's fees,) \$800; to James Lachner, \$96.50; to C. M. Foster, \$40; to Lawrence & Shinn, \$500; to T. C. Hyde, \$119; to E. L. Bradley, \$16; to H. Deckman, \$46.

Subsequent to the said fifteenth day of December, 1880, the appellants made the following advancements, to and for the respondent, of money and goods, viz.:

February 25, 1881.	Remittance to France,	\$125 00
April 4,	" Paid Stearns & Balleray note,	708 00
" 18,	" Telegraphic Exchange,	105 50
May 18,	" Cash,	25 00
July 26,	" Ottenheimer & Co.'s account,	115 00
	Washington Gulch account,	17 00
	Kauffman & Co.'s account,	99 00

And it further appears that the appellants received from the proceeds of said mine, subsequent to the said fifteenth day of December, 1880, gold-dust amounting in value to the sum of \$1,496.41; that the same was received July 17, 1881.

These general facts are the *data*, as I view the case, from which an adjustment and settlement of the mutual accounts and claims between the parties is to be made. Some questions have been made in regard to the relations of the parties, created by their agreement set out herein, but there can be no serious difficulty from that source. The instrument operated as a mortgage beyond doubt. Another question presented is as to the amount for which the appellants became liable upon the agreement with Benson; but that is easy of solution. The appellants are chargeable with no more than they received from the working of the claim by Benson under the agreement, unless they are to be charged with the Benson note of a thousand dollars. There would be no difficulty in arriving at a correct conclusion if we could ascertain when the expenses of the Lynn suit were paid, and whether they were included or not in the settlement of December 15, 1880. The respondent insists that the portion thereof he was liable to pay was included in the settlement, but the appellants contend that the respondent is liable for the whole expense paid by them on account of said suit, and that the expense was not included in the settlement; that the suit was not then terminated; and that the bill of items upon which the settlement was made shows that they could not have been included. The counsel who tried the case here seemed to have overlooked the importance of having an account taken between the parties by some competent accountant, and contented themselves with the introduction, at the hearing, of depositions. The case should not have been submitted in that style; a good book-keeper would have been much more effective in ascertaining the rights of the parties than a jurist; but the case is here, and we must dispose of it by the aid of such evidence as we have before us, or send it back and have the facts more thoroughly investigated.

The circuit judge who heard the case found that there was a balance due the appellants from the respondent of \$531.35. As I understand it, he allowed to the appellants one-third of the expenses paid or claimed on account of said Lynn suit, after reducing the referee's fees from \$800 to \$325, and allowed the thousand-dollar Benson note in favor of the respondent. The basis of his computation may have been just, but I do not see how the result could have been reached, in view of the unsatisfactory character of the evidence, by any certain mode. At least, I feel that the attempt to approach the real truth in the case is a groping effort. It hardly seems equitable to charge the appellants with the Benson note, when they realized nothing therefrom, nor are ever likely to. Again, the appellants have not produced a single voucher showing that they have paid any single item of the expense of said suit. Heilner testified that he had paid the several

items before mentioned, but did not state when he paid them, nor were the parties to whom the payments were claimed to have been made, produced. Besides, the accounts the appellants exhibited of merchandise and money furnished the respondent prior to said fifteenth day of December, 1880, were far from satisfactory, and contained unconscionable charges of interest; but, as the parties settled them, we do not feel at liberty to question their correctness, and would not refer to the matter except as a circumstance tending to raise a suspicion against the other account. In my opinion, it would be doing justice in the case to determine that the debt for which the transfer of the property was made by respondent to secure, and the other indebtedness which has accrued since, have been paid. The appellants have had possession of the property for a number of years. It has been productive, and they have received large payments from respondent, and kept the only account of the transactions we have; and if they have not been able to liquidate the indebtedness under the circumstances, or show by satisfactory proof that it has not been paid, they ought to forgive it, and grant the respondent a jubilee after the manner of an ancient and venerable custom.

There are, however, other circumstances to be considered. A good deal of the property included in the instrument by which the transfer was made to the appellants was never delivered to them, nor did they have possession thereof. That property, of course, should not be included in the decree for a reconveyance, nor should the property that has been sold by appellants, where the respondent has been credited with the price, be decreed to be reconveyed, except upon condition that the respondents pay such price. It appears that the appellants sold the barber-shop in Baker City on December 30, 1879, for \$675. This may or may not have included said lot 2 of block 2 of Fisher's addition, as described in the contract between appellants and respondent, before mentioned. However that may be, the respondent has been credited with the \$675, as will be seen upon the appellants' exhibit of accounts, and he should not have the property back except upon condition that he pay appellants that sum. Under the view suggested, the decree herein should be that the appellants, within 60 days after the entry of this decree in the court below, execute and deliver to the respondent a good and sufficient deed or other instrument of reconveyance of all the property conveyed to them by the conveyance of March 26, 1878, except such personal property as was not delivered to them or retained by respondent, and except, also, such property as the appellants have sold that was so conveyed to them, and the price therefor has been credited to respondent upon accounts between them which have been settled, unless the respondent pays to appellants such purchase price, and the respondent shall recover costs of this appeal; that the decree appealed from be affirmed, except so far as modified by the decree herein.

Let a decree be entered accordingly.

v.7p,no.6—23

(12 Or. 347)

GLAZE v. LEWIS.

Filed June 10, 1885.

PRACTICE—JUDGMENT OF JUSTICE OF PEACE—LIEN—REVIVAL.

A justice of the peace has no power to revive a judgment. A judgment of such justice becomes a lien upon land only when docketed in a court of record, and to revive such judgment the circuit court is properly invoked.

Appeal from Polk county.

W. H. Holmes, for appellant.

J. J. Daly and *N. L. Butler*, for respondents.

LORD, J. This is an appeal from the order and judgment of the circuit court for Polk county, granting leave to the respondent to issue execution on a docketed judgment of the justice's court. The question involved depends for its solution upon the construction and effect to be given to the provisions of our statute in respect to the docketing of a justice's judgment. It is provided by the Justice's Code that "whenever a judgment is given in a justice's court in favor of any one for the sum of ten dollars or more, exclusive of costs or disbursements, the party in whose favor such judgment is given may, within one year thereafter, file a certified transcript thereof with the county clerk of the county wherein such judgment is given, and thereupon such clerk shall immediately docket the same in the judgment docket of the circuit court." Section 53, p. 469. "From the time of docketing a judgment of a justice's court, as provided in the last section, the same shall be a lien upon the real property of the defendant, as if it were a judgment of the circuit court wherein it was docketed." Section 54. And "when a judgment given by a justice of the peace has been duly docketed in a circuit court, thereafter it must be enforced as a judgment of such circuit court." Section 61. The appellant contends that the effect of these provisions in providing for the docketing of a justice's judgment is only to create a statutory lien, and not to make such judgment, when docketed, in effect a judgment of the circuit court; and, as a consequence, he claims that when the lien has expired by lapse of time, the effect of the docketing is gone, and the judgment lapses into its former condition of a justice's judgment, which the circuit court is without jurisdiction to revive; but that if such judgment can be revived at all, it must be done by the justice's court. It is quite certain that a justice's court is without the power to revive a judgment so as to create a lien. Its judgments only have this effect when docketed as prescribed by the sections cited, and if the argument insisted upon is tenable, when the lien expires the judgment cannot be revived.

The provisions of the sections referred to are, in substance, that when such judgment is docketed, "the same shall be a lien, etc., as if it were a judgment of such circuit court," and "thereafter it must be enforced as a judgment of such circuit court." The words "as if it were a judgment of such circuit court" seem intended to place such

a judgment, when docketed, upon the same footing in all respects, as to the lien creditor, with a judgment of the circuit court. And as, "thereafter, it must be enforced as a judgment of such circuit court," it would seem, when docketed, to have the same effect as a judgment of the circuit court. Under a statute providing that "such judgment shall have the same effect as a judgment rendered in the circuit court, and may in the same manner be enforced," etc., it was held that a transcript properly certified, filed, and docketed, renders the judgment thus transcribed and certified a judgment of a court of record from the time of such filing and docketing; thus changing in some degree its nature, and very materially the rights, powers, and liabilities of the parties to it. *Jewett v. Bennett*, 3 Mich. 199, 200. When docketed in the circuit court it has the same effect as a judgment rendered in that court, and is to be enforced, canceled, or discharged, and is affected by the statute of limitations, in the same way. *Arnold v. Thompson*, 19 Mich. 333; *Davison v. Elliott*, 9 Mich. 252. It is from the date of the docketing of a judgment of the circuit court that it becomes a lien upon the real property of the defendant. Civil Code, § 263. And when a properly certified transcript of a judgment of a justice's court is filed and docketed "in the judgment docket of the circuit court," the same becomes a lien upon the real property of the defendant from the date of docketing such judgment, and it stands upon the same footing as a judgment of the circuit court. When, therefore, it was sought to revive the judgment, the circuit court had jurisdiction in the premises, and the application for leave to issue execution, was properly made to it.

There was no error, and the judgment must be affirmed.

(12 Or. 372)

SCOGGIN v. HALL.

Filed June 10, 1885.

JUSTICE'S COURT—INTIMIDATION OF WITNESSES—PARTY'S REMEDY.

A plaintiff's remedy at law is not exhausted by the intimidation of his witnesses in a justice's court. He can appeal to the circuit court, and have himself set right there. In such a case equity is not to be invoked.

Appeal from Wasco county.

Hill & Mays, for appellant.

Watkins & Bird, for respondent.

THAYER, J. This appeal is from the circuit court for the county of Wasco. The respondent commenced an action in a justice's court in that county against the appellant to recover a colt, which was about eight months old, and damages for its detention. The colt was alleged to be of the value of \$35. The parties met before the justice and engaged in the trial of the case. It seems that a row occurred between some of the witnesses, which interrupted the proceedings of the trial. The justice, in order to get matters quiet, adjourned the trial over to the following morning, at which time the appellant

appeared, and claimed that the disturbance the day before had intimidated his witnesses, and that he was unable to secure their attendance, and he took no further part in the proceedings, and the respondent obtained a verdict of the jury, upon which the justice entered judgment. The judgment is rather informal, but not void. After the rendition of the judgment, the defendant made an ineffectual effort to appeal therefrom to the circuit court for the county of Wasco, and, having failed in that, commenced a suit in said circuit court to have the enforcement of said judgment enjoined. The grounds of this suit were that the justice's judgment was void; that he had not been able, on account of the riotous conduct of the respondent and others, to make his defense in the said justice's court; and that he lost his remedy by appeal in consequence of the mistake of the constable in not serving the notice of appeal. The pleadings in said suit were made up, and depositions were taken on both sides, which, with other proofs, were submitted to said circuit court. Upon hearing the case, said court found that the allegations of the complaint were not sustained, and thereupon dismissed it. From that decision this appeal is taken.

The question before the court is mainly one of fact. I have examined the testimony with some care, but have not been able to discover that the difficulty which occurred at the justice's court trial was of a very serious character. It seems to have been more of a temporary character than otherwise, occasioned by some of the witnesses who were outside of the court-room getting into a broil. The parties who were in the court-room became interested to know about the affair, and several of them went out, and the respondent took off his coat. How long the difficulty continued does not appear. It was not a respectable occurrence, but not necessarily indicative of a perverse sentiment in the community in which it took place, nor was it *sui generis*. Scenes of a similar character about justice's courts have frequently happened, and have been known to occur even in circuit courts, and failed to intimidate a party. Such occurrences will not justify a withdrawal from a trial and the commencement of a suit in equity to impeach the proceeding at law, unless attended with such a degree of violence as to obstruct public justice, and the adverse party takes a fraudulent advantage of the situation. When order cannot be maintained in courts of law, it will not long survive in courts of equity. And when it cannot be upheld in the inferior tribunals, they should be abolished. If the grounds upon which jurisdiction in equity is claimed in this case were conceded, it would be to my mind a humiliating admission. I should be loath to acknowledge that a regular trial of the right of possession of an eight-months old colt, of the value of \$35, could not be had before any justice of the peace in any precinct in this state. I may be too incredulous in that particular, but, if I am mistaken as to the fact, the attention of the grand jury should be directed to such precinct at once. At least, some other rem-

edy should be applied than taking such a character of litigation into the bosom of chancery.

But it is idle to consider the question involved. There is no feature of it to which equity jurisdiction will attach. The appellant had a plain, speedy, and adequate remedy at law, and it was not exhausted when intimidation overtook his witnesses. An appeal to the circuit court, where he could have had a regular trial by jury, was open to him. All that was necessary was to serve a proper notice of appeal, give the requisite undertaking, and file a transcript of the proceedings of the justice's court with the clerk of the appellate court. The constable's mistake in not serving the notice of appeal was no excuse; the law does not compel a party in such a case to employ a constable, and he would have no business to employ an inefficient, careless one, under any circumstances. The failure has the appearance of having resulted from negligence, viewed from any point. The case has been dragged into the circuit court, and has cost more, I imagine, than the colt will ever be worth.

The judgment appealed from should be affirmed.

(12 Or. 345)

BROWN and others v. SCHOOL-DISTRICT No. 1.

Filed June 10, 1885.

ILLEGAL TAX—PROPER COURSE FOR TAX-PAYER.

When a party considers himself aggrieved by a tax imposed, he should pay the same under protest, so that, if illegal, it may be recovered back.

Appeal from Clatsop county.

C. H. Page, for appellants.

C. W. Fulton, for respondents.

THAYER, J. This appeal is from the circuit court for the county of Clatsop. The appellants commenced a suit in that court against the respondents to restrain the enforcement of a certain school tax, levied upon the taxable property thereof by a vote of the legal voters of a school meeting held in the above-named district on the fifteenth day of July, 1884. The appellants are tax-payers of said school-district, and have been assessed large sums on account of said tax. The object of the tax, as appears from the pleadings in the suit, was for the following purposes, and made up of the following items, viz.: One and one-third mills on the dollar for school purposes; one and two-thirds mills on the dollar for the purpose of paying interest on the bonds issued by the district; and one-half of one mill on the dollar for the purpose of making necessary improvements to the school-house block owned by the district. It appears that said tax was assessed in due form upon the property in the district, but that the appellants refused to pay their assessments, and were returned upon the delinquent list, which was placed in the hands of the sheriff of said county for collection, as provided by law, and that the sheriff

is about to sell their property to satisfy the various amounts. The appellants claim that said bonds are void; that said district had no authority to issue them; and that the attempt to levy taxes in order to pay the interest thereon is illegal. Upon that ground they resist its collection.

The respondents in the court below filed an answer to the appellants' complaint, setting out all the facts in reference to the issuance of said bonds, and the objects for which they were issued, and the levy of said tax. The appellants filed a demurrer to the said answer, upon the grounds of the illegality of the bonds, which having been overruled, and a decree entered dismissing the appellants' complaint, the latter has brought this appeal, and desires this court to adjudge the said bonds a nullity. The respondents, on the other hand, claim that the bonds are valid; that the school-district issued them in order to raise money to build a school-house, and that the money has been received by the district, and the house built. It will be noticed that the larger part of the tax is unquestionably legal. The one and one-third mills for school purposes, and the one-half mill for the purpose of making necessary improvements to the school-house block, are unobjectionable, and it appears to this court that the appellants should have paid so much of said tax as is applicable to those purposes before they commenced their suit. It would render it, no doubt, very embarrassing to the affairs of the school-district if the court were to interfere and enjoin the collection of the entire tax. If the appellants had paid off the portion admitted to be legal, they would have done equity before asking its interposition in their behalf. The authorities are not uniform upon the question as to whether or not a plaintiff's complaint should be dismissed in such a case, but this court is of the opinion that that is the better rule. If the appellants are obliged to pay the portion of the tax they claim to be illegal, they will not necessarily lose the amount paid. They can pay it under protest, in order to relieve their property, and if it be illegal, can recover it back.

As to whether said bonds are good or valid the court expresses no opinion at this time, as it is not necessary to the disposition of the case under the view entertained.

For the reasons mentioned, the decree appealed from will be affirmed, and the complaint dismissed, without prejudice.

(12 Or. 36)

KINNEY v. HEATLEY and others.

Filed June 11, 1885.

RIGHTS OF PARTIES UNDER A DEED OF TRUST.

Facts reviewed, circumstances considered, and decree affirmed, with a modification.

Appeal from Clatsop county.

C. W. Fulton and Raleigh Stott, for appellants.*J. C. Moreland and Benton Killin*, for respondent.

THAYER, J. This appeal is from the circuit court for the county of Clatsop. The respondent brought a suit in that court against the appellants, Heatley, Grace, and Ten Bosch, trustees of the estate of the said respondent, for the payment of certain debts, to compel them to account for the said estate, and to enjoin them from selling a certain part thereof. It is disclosed by the facts in the case that the respondent, about 1876, at Astoria, in said county, engaged in the cannery business; that he was the proprietor of a cannery, and put up fish and beef in cans for market, and sold and shipped large quantities thereof to England; that he continued in said business until the nineteenth day of February, 1878, when, in consequence of extensive liabilities that had accumulated against him, he was compelled to suspend business, and compromise his debts with his creditors; that on said last-mentioned day the said respondent, at San Francisco, in the state of California, entered into an agreement with a large number of his creditors, by the terms of which he agreed to execute to the said Heatley, Grace, and Ten Bosch a deed of trust and transfer of his property in the manner and form of an instrument then prepared and agreed upon, and which was to be executed by both of said parties,—the said creditors agreeing on their part to extend the time of payment of their respective debts they held against him until the first day of October, 1878, and to release him from all obligations to pay said debts or either of them, and to look wholly to the property which should be transferred in said deed of trust so agreed to be made, and the proceeds thereof, for the payment of said debts, and that the said release should take effect upon the execution of said deed; that subsequently, and on the sixteenth day of March, 1878, in compliance with the said agreement, the said respondent executed to the said Heatley, Grace, and Ten Bosch, as such trustees, a deed of trust conveying to them the said cannery, and all his real and personal property, excepting such as was exempt from execution, and also the sum of \$500 in cash. Said deed contained the following clauses and provisions, viz.:

"Should said trustees deem it advisable, and for the best interest of all concerned, so to do, and in that event to procure the advancement of the necessary means and provisions for the same on the most favorable terms that the same can be obtained, to operate and conduct said business, and to sell and dispose of the proceeds thereof, and to apply the money and profits arising from such sale or disposition on the first day of October, 1878:

"*First*, to the payment of the necessary advances and running expenses of said business; to make the best arrangement or compromise that they can with French & Co., of The Dalles, and Thomas Monteith, of Albany, Oregon, for all claims that they have against the said party of the first part, and with any and all other preferred or other creditors of said party of the first part, who have not entered into the agreement under which this deed of trust is executed; to the discharge of the debts of said party of the first part, and said fishery or cannery. No interest to be allowed on any claim from the first day of January to the first day of October, 1878.

"Also, in trust, to sell, dispose of, and transfer any or all of the property herein transferred to said parties of the second part, not included in said Astoria fishery, or pertaining thereto, on or before the first day of October, 1878, and apply the proceeds thereof in the same manner as the proceeds, money, and profits of said fishery or cannery hereinbefore authorized; but the money arising from such sales, as well as that arising from the sale of salmon of the canning season, or so much thereof as shall be necessary, may be applied before the first day of October, 1878, in the discharge of the advances made for operating and conducting said fishery business hereinbefore specified. And the money arising from the sales of the lots for which bonds have been given to said party of the first part, as hereinbefore designated, as well as the sums due from the sales of the said bonded lots already made, shall be applied first to the discharge of the promissory notes given for the same, and thereafter as balance is sold before the first of October, 1878."

"*Fourthly*. But should the said trustees find it impracticable to run the said cannery, that then the said trustees shall, with all convenient dispatch, dispose of the property hereby conveyed, including said Astoria fishery, and the property pertaining thereto, at such times as they or a majority of them shall deem most advantageous for the interest of all persons concerned, anything hereinbefore contained as to the time of such sale notwithstanding.

"And said party of the first part does hereby authorize and empower any two of the said parties of the second part to execute any of the conveyances in instruments of any name or nature, or do any act whatsoever, necessary to carry out the intention of this deed, with the like force and effect as if all three had joined in such action.

"Also all trust after the first day of October, 1878, to sell, dispose of, and transfer all the property herein transferred to said parties of the second part, and not then disposed of, after allowing said party of the first part sixty days to discharge the balance of said debts, appropriating the property, or so much as may be necessary, for the same. The proceeds of such sales to be applied to the discharge of the debts; only so much to be sold as shall be necessary for such purpose, and the balance of all the property, after the discharge of the debts, to be transferred to the party of the first part. Also,

"In trust, to conduct and manage said business and property economically, and in a business-like manner; to keep proper and separate books of accounts and vouchers, which shall always be opened to inspection by parties interested; to deposit the money arising out of said business or property, not in immediate actual use, in a trustworthy bank of good reputation, and to faithfully discharge the duties of the trusts herein conferred, in the best interests of the creditors and the party of the first part.

"And the parties of the second part hereby accept the trusts herein conferred, and agree to faithfully perform the obligations of said trusts as herein specified."

Upon the execution of said deed of trust, the said trustees engaged in operating said cannery, and continued to operate it during the seasons of 1878, 1879, 1880, and 1881. It appears that they ob-

tained permission of the respondent to operate it during the season of 1879, but they had no permission from him to operate it during the remaining two seasons, unless it were implied. Subsequent to 1881 the said trustees sold the cannery back to the respondent. From these various sources and transactions the trustees derived a large amount of funds applicable to the payment and discharge of the said debts.

The respondent alleged, in his complaint in the suit, that he was informed and believed that said trustees had, prior to January, 1882, realized more than sufficient to pay all the claims against the estate. He also complained of their having sold certain real property which they were not authorized to sell under the trust deed, and that they were offering to sell other portions thereof, and that they had refused to make him a statement and accounting of the condition of the affairs of the estate, although he informed them that if it should be ascertained upon such accounting that they had not realized sufficient to satisfy all just and legal claims against it, he would advance to them the balance, and receive back the residue of the property unsold. The said trustees filed an answer to the complaint, in which they set forth a statement of their account, also the claims of the creditors, who were also made parties to the suit, upon motion of the counsel for the trustees. The respondent filed a reply, in which he controverted many of the matters alleged in the answer, and the main question presented for the consideration of this court arises out of the issues of fact so formed.

The first issue referred to involved the amount of the indebtedness from the respondent to certain of the creditors at the time the deed of trust was executed. Those creditors, excepting one,—the Salem Flouring Mills Company,—were parties who had received from the respondent amounts of salmon and beef, either by purchase or on commission,—counsel at the hearing did not exactly agree which. The respondent shipped them salmon, and they made advances to him. He was responsible for the proper packing, and they took the risk of sea damage. The salmon not proving good, they made reclamations upon him, and in most cases he had agreed to allow them. These accounts were between Dickson, De Wolf & Co., W. & J. Lockett, Henry Coubrough, and Ten Bosch & Co. Dickson, DeWolf & Co. are E. D. Heatley, or Campbell & Heatley. There is, however, an item as a drawback against the account of W. & J. Lockett, for amount paid by respondent in shipping certain amount of salmon from Astoria to San Francisco, and placing aboard the cars. The salmon was obtained by the Locketts from the respondent, to be shipped direct by vessel from Astoria to Europe, the former to pay freight, but they subsequently concluded to have it go across the continent by rail, from which circumstance the item of expense accrued. Another of the issues referred to involves the amount of compensation, the trustees should be allowed for their management of the estate.

These issues and their collaterals include the main controversy between the parties. The matter of compensation of the trustees is not difficult to adjust, but the claims for reclamations of advances on the salmon are very much complicated. The respondent claims to have put up the salmon properly, but one cargo of them, shipped by the Titan, arrived in Liverpool in a wretched plight. The appellants claim that it was occasioned by bad packing; but, after hearing the testimony and proofs respecting it, and observing the great disproportion of spoiled cans between that shipment and others the respondent made, we are convinced that the severe stress of weather the vessel encountered upon her voyage, the effect upon her other cargo, and upon the vessel itself, caused the greater part of the damage to that lot. But the appellants' counsel contend that the respondent cannot now question the correctness of the accounts of said parties for reclamations, for the reason that he assented to all of them, and some of which he agreed especially to pay; that these accounts, as between said parties, stand upon the same footing of an account stated, and cannot be surcharged or falsified without clear and satisfactory proof of fraud or mistake. But we must take into consideration the circumstances under which these parties were situated. The respondent was on this coast, and the parties with whom he dealt in Europe. He shipped them the salmon under an agreement that he should be chargeable with all blown tins resulting from improper packing. After the salmon left Astoria the respondent saw nothing more of them, and he must have relied entirely upon the statements of his consignees. He reposed confidence in them, and when they advised him that the salmon had proved bad in consequence of bad packing, he would be likely to treat it as a matter of course, and to acquiesce. He evidently knew nothing at the time of the severity of the voyage, or the extent the cargo had suffered in consequence of rough weather. He did question the correctness of the accounts, and insisted that the trustees should allow none that should be ascertained to be incorrect, and the evidence is very strong that the trustees and creditors agreed to that. I cannot believe that it would be fair to hold that the respondent was bound by any admission he made as to the correctness of those accounts, or promise to pay them he is shown to have made, if, as a matter of fact, the salmon were properly put up.

When the Titan reached Liverpool, it was ascertained that a large proportion of the cans containing the salmon had burst. This result, under ordinary circumstances, would have indicated improper packing; and when the consignees promptly advised the respondent of the miserable condition in which his shipment had arrived, and very emphatically informed him that it had been occasioned by improper canning, he could have done no less than acknowledge a liability to repay the advances. The consignees did not probably mention to the respondent that the vessel which transported the goods encountered such severe storms and rough sea that she lay for a long time with

her lee-rail under water, and straining and creaking fearfully, the sea continually washing over her decks fore and aft; that the cargo of wheat and flour was wet and spoiled; that the heat, which generated in consequence, was so intense that it was felt through the deck; that it scorched and blackened the wood-work in proximity to it; and that the gas and steam emitted from the hold when the hatches were off, were so dense that the vessel, when at the Liverpool dock, was supposed by many to be on fire. These facts were left for the respondent to discover the best way he could, and he only ascertained them long after he executed the deed of trust. It would certainly be unjust to hold that these accounts became, under the circumstances, accounts stated. I think the question whether the salmon were improperly put up, or were damaged by the sea, is an open one, and that the main damage to that shipped aboard the Titan was sea damage, and that no reclamations should be allowed the parties receiving it on account of advances made thereon; and the amounts charged in any of said accounts for such reclamations should not be allowed in favor of such parties.

The trustees should be allowed a reasonable compensation for attending to the matters of the estate; but their pretended employment of Dickson, De Wolf & Co., who were none other, as appears from the evidence, than the said E. D. Heatley himself, to make the purchases for the cannery of supplies, etc., and to sell and dispose of the proceeds of the cannery, and agreement to pay the commission of $2\frac{1}{2}$ per cent. upon all purchases, and $2\frac{1}{2}$ per cent. upon all sales, were not claimed by appellants' counsel to have been legal. No such arrangement could be recognized by the law as binding upon the estate. At the same time, the trustees should be allowed such an amount of compensation as would cover all necessary services of that character, and we are of the opinion that the amount allowed by the circuit court ought to be sufficient.

The thirty-eighth finding of the referee, which is as follows, we think correct:

"(38) That in 1878 plaintiff sold and shipped to said Locketts canned salmon at a stipulated price, *c. f. i.*; that subsequently Locketts directed the shipments to be made overland, they paying the extra freight; that there were so shipped 8,750 cases; that they credited plaintiff £47 6s. 9d. too much on ocean freight to Europe, but omitted to credit plaintiff £300 6s. 10d. paid by him in shipping the salmon from Astoria to San Francisco, and placing the same aboard the cars; that plaintiff is entitled in said account of W. & I. Lockett to a credit of £268."

The respondent's counsel contended upon the argument that the deed of trust is only a mortgage, and that, consequently, the respondent was not chargeable with interest. Whether interest could or not be charged in case the transaction were only a mortgage, we express no opinion; but to refuse to allow interest upon the claims in favor of the said creditors would be very inequitable, to say the least. It may be difficult to say wherein the transaction differs from a mortgage,

yet it is certainly not one. Mr. Pomeroy, in his work on Equity Jurisprudence, attempts to point out the distinction in such cases, and we content ourselves upon that point by referring to section 995 of that work.

The question raised by the appellants' counsel upon the argument, as to whether the appellants should have been required to pay any part of the costs of the litigation, and whether it should not all have been imposed upon the respondent, is entitled to a good deal of consideration. I would not be willing to hold that he should pay for the services of the appellants' counsel beyond that which is taxable as costs. But it seems to me that he ought to be required to pay all the statutory costs of the case. Had the respondent tendered or made a written offer to pay a sum equal to the balance still due the said creditors, I should have viewed the question differently. I can see no alternative but that the case will have to go back in order to ascertain the amount included in the accounts of said creditors for reclamation of advances made upon the salmon shipped aboard the vessel Titan. The said creditors are entitled to no such reclamations; but, as the case stands now, it is impossible to ascertain that fact. When it shall be known, the overcharge in each of the accounts of said creditors can be deducted, and a decree entered accordingly. It may be a fact that when such respective amounts are ascertained and deducted, there will be nothing due upon the accounts of said W. & J. Lockett, Henry Coubrough, and N. Ten Bosch & Co.; but I do not see how that can be found out until there are some *data* showing what portion of each of their claims was for reclamations upon salmon shipped upon the Titan. Reclamations upon salmon shipped upon the other ships are not affected.

The decree to be entered in the circuit court, when the fact referred to is ascertained, will be in accordance with the decree appealed from, except so far as modified by this opinion.

SUPREME COURT OF NEVADA.

(19 Nev. 143)

WRIGHT v. SMITH.

Filed June 20, 1885.

ESTATES OF DECEDENTS—COMMUNITY PROPERTY—STATUTE OF NEVADA, 1881.

Under the statute of 1881, the title to community property, after a man's death, was, subject to the payment of the debts of deceased, in the widow, and an administrator was not required to convey the title or distribute the estate.

Appeal from the Fourth judicial district court, Elko county. The opinion fully states the facts.

R. M. Clarke and Fitzgerald & Beatty, for appellant.

LEONARD, J. This is an appeal from an order revoking the appointment of Jane Wright, administratrix, and appointing W. T. Smith administrator of the estate of A. W. Gedney, deceased.

On the twenty-second day of June, 1882, A. W. Gedney, a resident of Elko county, Nevada, died intestate, leaving an estate situate in said county, consisting of real and personal property. He left, also, a widow, and several minor children, surviving him. Jane Gedney petitioned the court to be appointed administratrix. She was appointed January 6, 1883, and she qualified as such January 13, 1883. The estate was appraised at \$28,404.51, and notice to creditors given. December 5, 1883, Jane Gedney married John T. Wright, and January 16, 1884, she filed a petition in the name of Jane Wright, praying that her former letters be adjudged invalid by reason of her marriage, and that new letters be issued to her in the name of Jane Wright. On the twenty-fourth of April, 1884, her petition was granted, and the court ordered that letters be issued to Jane Wright, upon her qualifying by taking the proper oath, and filing a bond in the sum of \$47,292. She did not take the oath or give the bond required, and new letters were not issued.

On the twenty-second of July, 1884, W. T. Smith, respondent herein, petitioned the court for letters of administration. In his petition he stated the facts above mentioned, and, in addition, that he was a citizen of the United States, over 21 years of age, and a resident of Elko county; that a claim of S. B. Talbot for the sum of \$3,696 against said estate had been presented to Jane Gedney, administratrix, allowed, and paid; that, except as stated in the petition, the estate had not been administered upon, and that the greater part thereof was then in the possession of said Jane Wright. A citation was issued requiring Jane Wright to show cause before the court why she should not qualify as administratrix, or that the order of April 24, 1884, be annulled, and the said W. T. Smith appointed administrator.

At the time set for hearing she appeared by her attorneys and filed her objections to Smith's appointment, in substance as follows: That

she was the surviving wife of deceased, A. W. Gedney; that ever after their marriage she lived and cohabited with him; that said A. W. Gedney died intestate in Elko county, Nevada, June 26, 1882, having both real and personal property in said county; that within a year after the death of said deceased she settled and paid all of the lawful debts due from, and all claims against, said estate; that all of said property was common property, and no part of it was the separate estate of deceased; that, by reason of the above facts, said property was not subject to administration; that the petition of said W. T. Smith did not show facts sufficient to entitle him to letters of administration, because it nowhere appeared therefrom that the property of A. W. Gedney was subject to administration, or was the separate property of said deceased, or that it was not exempt from execution, or that there were any debts against said estate, or that said Smith had any interest in said estate, or was a person entitled to letters of administration.

The facts alleged in Smith's petition were proven to the satisfaction of the court; but it was not alleged or shown that any of the property was the separate property of Gedney, or that there were any unsatisfied claims or demands against the estate, or that the petitioner was creditor or heir, or had any interest in the estate. On the contrary, it was shown, by records and papers on file, introduced by Smith and admitted without objection, that all of said property belonged to the community. Besides the fact just stated, the record shows that, after respondent had rested, and the court had overruled appellant's objection to respondent's appointment upon the showing made, appellant offered and endeavored to prove, by a witness then before the court, that all the property of which A. W. Gedney died seized, belonged to the community. This evidence was excluded, and appellant duly excepted. The court held that an administrator should be appointed, although the entire property belonged to the community. Certainly this was error, if appellant had paid all indebtedness legally due from the estate, or had secured the payment of the same to the satisfaction of the creditors. St. 1881, p. 103; St. 1883, p. 16.

Under the statute of 1881, upon the death of A. W. Gedney, the entire community property became appellant's without administration, although it was subject to all debts contracted by Gedney during his life-time, not barred by the statute of limitations; and if she paid all indebtedness legally due from the estate, or secured the payment of the same to the satisfaction of the creditors, then the community property was not subject to administration. That statute was in force at the time of Gedney's death, and to its provisions must we look in ascertaining her rights. Neither in his petition nor by his proofs did respondent show himself entitled to letters. There were no facts before the court tending to show that further administration was necessary, or that the property was subject to administration.

Under the statute the title to community property, subject to the payment of legal indebtedness, was in appellant, and an administrator was not required to convey the title or distribute the estate.

The record shows that, "upon the hearing of said petition and the said objections thereto, the said petitioner, to maintain the issues upon his part, introduced in evidence to the court, without objection, the following records and papers on file in the matter of the estate of said A. W. Gedney, deceased, following: The petition of said Jane Gedney to be appointed administratrix of said estate, filed December 22, 1882. Said petition showed that * * * the whole of said property, both real and personal, was the community property of said A. W. Gedney and said Jane Gedney."

There was no allegation in respondent's petition, and no testimony tending to show, that any portion of it was the separate property of deceased. On the other hand, in her written objections to respondent's appointment, filed in court, appellant alleged that prior to her husband's death the entire property belonged to the community; that upon his death it became her separate property, and was not subject to administration, because she had paid and settled all lawful debts due from, and all claims against, the estate.

We think, under the circumstances, respondent was bound by the contents of appellant's former petition in relation to the character of the property; that is to say, that it belonged to the community. It was introduced by him generally in the case without any limitation as to its effect. So far as this application is concerned, he was bound by it. The evidence, and the only evidence, then, before the court, upon this point, was that the property belonged to the community prior to Gedney's death, when it became appellant's, subject to the payment of Gedney's debts, but not to administration, if, prior thereto, appellant should pay the debts, or secure them to the satisfaction of creditors. *Babbitt v. Bowen*, 32 Vt. 439; *Hargroves v. Thompson*, 31 Miss. 214; St. 1881, p. 103; St. 1883, p. 16. See, also, *Thompson v. Thomas*, 30 Miss. 153; *Beckett v. Selover*, 7 Cal. 238; *Updegraff v. Trask*, 18 Cal. 459; *Hall v. Hall*, 27 Miss. 459.

Since the entire property belonged to appellant, the court must have presumed, in the face of her allegation to the contrary, that there were unpaid debts; otherwise there was no foundation for the order appointing respondent, for it was not asserted or proved that there were any debts. Under the circumstances of this case there was no legal presumption either for or against the existence of debts; and the court had no right to disturb appellant in the enjoyment of her property, or burden the estate with useless expenditure, without satisfactory proof that the property was subject to administration, and that the appointment of an administrator would accomplish some useful end.

If there are no debts, respondent has no more right to administer upon this estate than he would have had if Gedney had not died.

Such being the case, it was incumbent upon him to show, not only the necessary jurisdictional facts, but also the fact of indebtedness. Without assertion and proof of that fact, he had no right to ask for letters, or the court to grant them. *Succession of Esther Poret*, 26 La. Ann. 158; *Duncan v. Veal*, 49 Tex. 610. The opposition to respondent's appointment should have been sustained.

That portion of the order appealed from appointing W. T. Smith administrator of the estate of A. W. Gedney, deceased, is reversed, and his application denied, at the cost of respondent.

SUPREME COURT OF UTAH.

(4 Utah, 122)

UNITED STATES v. CANNON.

Filed June 27, 1885.

1. POLYGAMY—INDICTMENT—EDMUNDS ACT—AVERMENT—MALE PERSON.

In an indictment under act of congress of March 22, 1882, it is not necessary to aver that the defendant was a male person.

2. SAME—EVIDENCE—SEXUAL INTERCOURSE.

The misdemeanor against which the act of March 22, 1882, is directed, is the dwelling by a man with more than one woman, in the repute of matrimony; and to establish the fact, evidence of sexual intercourse is not necessary

Dickson & Varian, for the United States.

Arthur Brown, Bennett, Harkness & Kirkpatrick, Sutherland & McBride, and F. S. Richards, for appellant.

BOREMAN, J. On the seventh day of February, 1885, the defendant, Angus M. Cannon, was indicted in the Third district court for the crime of unlawful cohabitation. After trial and a verdict of guilty, he made his motion for a new trial, which was overruled, and thereupon, on the seventh day of May, 1885, he was sentenced to the penitentiary for six months, and to pay a fine of \$300. From the order overruling the motion for a new trial, and from the final judgment, the defendant has appealed to this court. The body of the indictment reads as follows:

"The grand jurors of the United States of America within and for the district aforesaid, in the territory aforesaid, being duly impaneled and sworn, on their oaths do find and present that Angus M. Cannon, late of said district, in the territory aforesaid, to-wit, on the first day of June, in the year of our Lord one thousand eight hundred and eighty-two, and on divers other days, and continuously, between the said first day of June, A. D. 1882, and the first day of February, A. D. 1885, at the county of Salt Lake and territory of Utah, did unlawfully cohabit with more than one woman, to-wit, one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same."

The appellant claims that the indictment is insufficient, and that it was error to admit evidence under it. He relies upon two alleged defects in the indictment.

1. That it fails to allege or show that the defendant is a "male person." The action is based upon the third section of "An act to amend section 5352, Rev. St., in reference to bigamy, and for other purposes," approved March 22, 1882, and commonly known as the "Edmunds Act." The section referred to provides that "if any male person in a territory * * * shall hereafter cohabit with more than one woman, he shall be deemed guilty of a misdemeanor," etc. The name "Angus" is in this community recognized as that of a "male person;" the defendant himself, however, being the most public character bearing the name. Outside of this community it is well recognized as a male appellative. The word "person" embraces all man-

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kind, and mankind is divided into two classes, one male and the other female. The statute says that this crime can be committed only by the members of one class—the male—upon and with members of the other class—the female. When, therefore, as in the case under consideration, the specific crime is charged to have been committed by some person upon and with those of the female class, the natural and inevitable conclusion would seem to be that the “some person” committing the offense belonged to the other—the male—class. The law would presume this, and its statement in the indictment would be unnecessary. *Crim. Pr. Act*, § 159; *Laws Utah 1878*, p. 94.

The grand jury could not have intended to indict a female under such a statute. To have done so would have been not only irregular, but in violation of their oath. The court cannot, in the absence of evidence, assume that the grand jury committed so great a folly and performed so vain a work. All presumptions are in favor of the regularity of their proceedings. *People v. Mills*, 17 Cal. 276; 1 Whart. *Crim. Law*, § 713; 2 *Russ. Cr.* 732.

This is not the case of an indictment where there are different classes or kinds of persons who can commit the offense. That was the peculiar feature of the case of *People v. Allen*, 5 Denio, 79, cited by the defense. In such a case it would be clearly necessary to specify in the indictment the class the defendant was charged with belonging to, for the reason that there were two classes. In the case before us, however, there could be no doubt as to the class, as there is but one class. But in the case of *People v. Allen*, the title “clerk,” or “servant,” was not so much a description of the person, as it was an element in the description of the offense itself. It was a case of embezzlement, where the money had to be received by him as the clerk or servant, and in the course of his employment as such. In the case at bar, however, the word “male” can hardly be said to be an element in the description of the offense; it is simply a designation of the class of the offender. This designation of the defendant could in no way aid in establishing his identity. That was fixed by the name, which, upon arraignment, he admitted to be correct.

In some of the states, such as New York, Massachusetts, Pennsylvania, etc., the statutes against rape say that “whosoever ravishes and carnally knows a female,” etc., (*Mass. St. 1871, c. 55*), or “every person who shall have carnal knowledge of any woman,” etc., (2 *N. Y. Rev. St.* 663, § 23,) is guilty of rape. The words “male person” do not appear in the statute, yet it is a well-known fact that no one but a “male person” could be indicted for such an offense. In a prosecution under such a statute, the court is required to presume, from the very nature of the offense itself, not only that the defendant named therein is a “male person,” but it would of necessity have to go one remove further, and presume the words to be in the statute; that is, that the statute, although it did not say so, meant to apply

to "male persons" alone. How much stronger is the case before us where the statute is express, and the court has to presume only as to the indictment. We think it is a settled general doctrine that in rape cases, even under the strict rules of the common law, it is not necessary to aver in the indictment the sex of the defendant. 2 Whart. Crim. Law, § 1154; 2 Bish. Crim. Proc. § 901, (Ed. of 1866;) *People v. Colton*, 2 Utah, 457. In the cases like the one under consideration, it is generally unnecessary to aver the sex in the indictment. Bish. St. Crimes, §§ 700, 705, 707. A case there referred to was where the indictment charged "that Daniel McLeod and Delany Waters, *alias* Lany Waters, did live together in a state of adultery and fornication." The name "Daniel" is a well-known male appellation, but "Delany" or "Lany" would seem to be as well suited to male as to female persons. Yet in that case the court held that it was not necessary in the indictment to state the sex. *McLeod v. State*, 35 Ala. 395.

The same rule that would apply to rape, adultery, and lascivious cohabitation cases, would apply to other classes of cases, in regard to other words. For example, the statutes against murder say that murder is the unlawful killing of a "human being" with malice aforethought. Yet in an indictment for murder it is not deemed necessary to allege that the victim was a "human being." *People v. King*, 27 Cal. 507. In every such case it is conclusively presumed that the deceased was a "human being," as there is no such crime as the murder of an animal or of an inanimate thing. And further, the statute does not say in express words that the unlawful killing must be the work of a human being in order to constitute a crime; yet the courts, from the very nature of the offense, do so hold. Not only so, but they go further, and presume the defendant, who is charged with the crime, to be a human being of a particular class, namely, one of responsible age and of sound mind.

A California statute says that "any person of the age of fourteen years and upwards, who shall have carnal knowledge of any female child under the age of ten years," etc., "shall be guilty of the crime of rape." The supreme court of that state holds that in an indictment under that provision it is not necessary to aver that the defendant is over 14 years of age; that the defendant's capacity to commit the crime is an element in the crime. *People v. Ah Yek*, 29 Cal. 575; citing *Com. v. Scannel*, 11 Cush. 548. So, if, in the case before us, it should be considered that the defendant's capacity to commit the crime be an element in it, yet it is not necessary to state in the indictment that he is a "male person." But, as stated above, we do not consider the words "male person" any element in the description of the crime. It would show that he belonged to the class which alone was capable, but it would not show that he individually was capable, or that he was not of irresponsible age, or not of unsound mind.

The case of *Ex parte Hedley*, 31 Cal. 108, and *Com. v. Libbey*, 11 Metc. 64, referred to by the defense on this point, do not seem applicable. They were both cases of embezzlement, and no question was raised as to the sufficiency of the indictment in either case.

We do not see wherein the insertion of the words "male person" would have aided the defendant in his defense. He could not thereby have been enabled to make any other or different defense than he has made. It would not have enabled him to understand any better the nature of the crime charged. If he has not been prejudiced in respect to his substantial rights, he cannot complain. *Crim. Proc. Act*, § 479; *Laws 1878*, p. 165; *Amended Laws 1884*, p. 126. We conclude, therefore, that it was not necessary to designate the defendant, in the indictment, by the words "male person." The fact, however, that he is a "male person" does appear from the indictment, taking it altogether, including the context, the nature of the offense, and the recognized application of the name to a male person.

2. It is claimed that the indictment is defective in not alleging that the defendant put forth any pretense of marital relation to the women mentioned. The appellant holds that the court has no right to interpolate words into the statute which the law-making power never intended to be there. That proposition, as a general rule, is undoubtedly true. But in the case in hand there is no interpolation. The question is on the indictment, and it shows no interpolation; but if it exists, it is in the interpretation of the words used in the statute and in the indictment. It is insisted that if the court construes the third section above specified as being confined to matrimonial cohabitation, it is wrong; but that if it is right, then the indictment is defective in not alleging that defendant cohabited with these women *as wives*. So far as the objection to the indictment goes, it is not a question as to whether it is defective if some peculiar construction be adopted, but whether it is defective in law, without any conditions. If it be assumed that the words "as wives," according to the suggestion in one of the briefs of appellant, were added in the indictment, would the alleged defect be cured? Exactly the same objection would arise as now arises without the addition of those words. The question would still remain, what is the meaning of the words "to live or dwell together as husband and wife?" The trouble, therefore, would not be ended if the suggestion of appellant were complied with. The addition of such words to that already in the indictment would be mere tautology, and would give the appellant no information as to the character of the charge against him that is not found in the indictment as it now stands. From the position taken afterwards in the briefs of the appellant, although the point is not made against the indictment, it is apparent that appellant holds that still other additions should be made to the description of the offense in the indictment. But as such particularity would not be required even in a murder case, we do not think it would be required in a case of mis-

demeanor. It is never necessary to detail in an indictment all the facts which the prosecution expect to prove, in order to make out a case, nor is the defendant ever entitled to them. He is entitled to a plain and concise statement or description of the offense charged against him, in order to be enabled to make his proper defense, and to enable him to plead a conviction thereunder in bar of another prosecution for the same offense.

In the construction of penal statutes care must be taken not to put such a construction upon the language as would include the innocent as well as the guilty. The evil to be guarded against must be kept in view. *Com. v. Stout*, 7 B. Mon. 249. We will not likely go astray if, with this rule always before us, we keep in remembrance that other indispensable rule, namely, that the intention of the legislature must be sought and followed, except that the construction must not be repugnant to the clear meaning of the words used. With these rules to guide, the cases cited by appellant under this second heading are clearly not inconsistent with our views of the proper construction to be put upon the statute under consideration. The only object of those references is to show that the indictment should have added the words "as wives" to the word "cohabit," and this we have shown would have availed nothing.

The offense with which the defendant is charged is purely statutory, and it is a new offense in our statutes. It is a general rule, well settled, that in an indictment for an offense created by statute, it is sufficient to describe the offense in the language of the statute. *People v. Colton*, 2 Utah, 457; *People v. Cronin*, 34 Cal. 191; *Lodano v. State*, 25 Ala. 64; *People v. Murray*, (Cal.) 7 PAC. REP. 178; *People v. Soto*, 63 Cal. 165.

The supreme court of the United States says that where a person is indicted for a purely statutory offense, it is sufficient in the indictment to charge the defendant with acts coming within the statutory description in the substantial words of the statute, without further expansion. *U. S. v. Simmons*, 96 U. S. 360. Where a new offense has been created by statute, without reference to anything else, it will be sufficient to describe the offense in the terms of the act. *People v. Saviers*, 14 Cal. 29; *People v. Shaber*, 32 Cal. 38. To the general rule of describing statutory offenses in the language of the statute there are exceptions; the principal ones being (1) when the statute makes that an offense which was an offense at the common law; and (2) when the offense is described in the statute in terms too general. The cases cited by the appellant come within the one or the other of these exceptions. As we have shown above, the indictment in the present case would have been no more certain and plain than it is, even if the definition of the word "cohabit" had been embraced therein. The word has an established meaning, and the indictment gives such particulars of time, place, and names of the women, as to inform defendant wherein he was charged with having

violated the law. If the case falls within either of the exceptions to the general rule, and would require more particularity, it has not been shown. It was the duty of the appellant to have done this. *State v. Abbott*, 31 N. H. 434; 1 Whart. Crim. Law, § 364.

The alleged offense is not claimed to have been an offense at common law; therefore it does not fall within the first of these exceptions, and it does not fall within the second exception, unless the description is in language too general to give the defendant information to which he is entitled to enable him to prepare his defense, or to plead the judgment hereafter in bar of another prosecution for the same offense, or too general to guide the court in passing sentence. If the indictment had charged the defendant with "cohabiting with more than one woman," without giving the names of the women, or without time and place, it would have been insufficient in not giving particulars, so as to enable defendant to make proper defense, or to plead the judgment hereafter.

In the exposition of a statute, the intention of the legislature is to be sought and followed, unless by doing so the construction to be given is repugnant to the clear meaning of the words; and if the meaning of the words is plain and obvious, the only safe course is to suppose the legislature intended those things which the words denote. *Leoni v. Taylor*, 20 Mich. 155. If the language is clear, it is conclusive, and the words must not be narrowed down to the exclusion of what the legislature intended to embrace; but the intention must be gathered from the words. That sense of the words should be adopted which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. *U. S. v. Hartwell*, 6 Wall. 385.

What, then, was the object of the congress in enacting this statute? It was, judging from the whole act, intended to be an aid in breaking up polygamy and the pretense thereof. The well-recognized difficulty of reaching the polygamy cases by reason of having to prove marriage, and by reason of the fact that the statute of limitations bars prosecutions after three years, no doubt led congress to pass this act. It was sought to break up the polygamic relation. It was necessary, in effect, to make polygamy a continuous offense, without requiring proof of marriage. Whether marriage took place or not, the pretense of marriage—the living, to all intents and purposes, so far as the public could see, as husband and wife,—a holding out of that relationship to the world,—were the evils sought to be eradicated. Although aimed primarily at such a relationship, it reaches out and embraces all men living and dwelling with more than one woman as if they were married, whether any marriage had ever taken place or not. It was living and dwelling together under the appearance of being married. The appellant insists that cohabitation necessarily includes sexual intercourse, and that there can be no cohabitation without it. We find nothing whatever in the language or context to

lead us to believe that congress meant to apply the statute to lewd and lascivious cohabitation, which would be the case if the construction contended for by the appellant were correct.

The primary meaning of "cohabit," is to dwell with, (*con*, with, and *habere*, to dwell;) and at the present day it is generally held to mean, to dwell or live together as husband and wife, or to dwell or live together in the same company, place, or country. *Calef v. Calef*, 54 Me. 365; *Com. v. Calef*, 10 Mass. 153; *Ohio v. Connoway*, Tapp. 90. This meaning is recognized in appellant's brief (p. 4) where it says that "in looking to the common signification of the word 'cohabit' we find but two meanings: one broad and generic, and including all residents of the same ward, town, city, or even country; and the other, the living together as husband and wife." The brief proceeds to place the construction upon the latter words which we have here referred to, and which we do not think are warranted.

That learned author, Mr. Bishop, says that he knows of no legal authority or usage that would embrace sexual intercourse in the word "cohabitation," except the casual misapprehension of Chancellor WALWORTH in *Dunn v. Dunn*, 4 Paige, 425, 428. 1 Bish. Mar. & Div. (4th Ed.) § 777, note 1. The authorities of the appellant on this point do not shake the position that cohabitation does not include sexual intercourse. The word does not even include necessarily the occupying the same bed. 4 Paige, 428.

In *Forster v. Forster*, 1 Hag. 144, where matrimonial intercourse was sought to be enforced between man and wife, the court drew the distinction plainly between "matrimonial intercourse" and "matrimonial cohabitation," holding that "the duty of matrimonial intercourse" could not be compelled, but that "matrimonial cohabitation" could be.

The case of *Orme v. Orme*, 2 Eng. Ecc. R. 354, was brought by the wife against her husband for restitution of conjugal rights. The libel admitted that the complainant was "allowed by the said Robert Orme to reside in the same house with him," and the court held that this admission of "cohabitation" admitted the complainant out of court, and that she might have been restored to cohabitation; yet as that was admitted to exist, and the court could go no further, that the court had no power to restore the complainant to matrimonial intercourse with her husband.

Had it been the intention of congress to include the common sexual vices in this provision, it appears unreasonable that it should not have said so. It evidently did not intend to include lewd or lascivious cohabitation; for, had it so intended, it would have added those words. When the bill was under consideration in congress, their attention was specially called to the matter, and it could not, therefore, have been an oversight. A member (Mr. Singleton) offered an amendment, whereby it was proposed to reach all of the sexual vices, and to punish adultery, fornication, open and notorious lewdness, etc.; but the amendment was voted down. Cong. Rec. March 15, 1882. Thus

congress clearly gave expression to their view, that no such offenses were to be embraced in the act. The crimes which congress proposed to punish were such as a large part of the people, especially in this territory, were upholding and practicing. The other vices were such as all people disapprove, and hence congress left their suppression to the local authorities. The interpretation we have given to this provision—the third section—is, as we think, the one best calculated to effect the object intended by congress and to suppress the evil. Hence, independent of the statutes of this territory governing pleadings in criminal cases, we think the indictment is sufficient; that it was not necessary to have added the words “as wives” to the description of the offense as set out in the indictment, nor to have given any particulars of the facts necessary to be proved, beyond what were given, and especially that it was not necessary to allege anything in regard to sexual intercourse. We have, however, a criminal procedure act in this territory which governs the mode and manner of criminal pleading, and we now come to consider that act, and see what effect it has upon the matters necessary to be stated in the indictment.

The criminal procedure act of this territory is to the criminal practice what the civil procedure act is to the civil practice. *People v. King*, 27 Cal. 507. As we are bound by the criminal procedure act, it is unnecessary to inquire what was the rule at common law, when the statute speaks. *People v. West*, 49 Cal. 610; *People v. Murphy*, 39 Cal. 52; *People v. Cronin*, 34 Cal. 191. The criminal procedure act says: “All forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this act.” Utah Laws 1878, p. 91. If the indictment will stand the test of these rules, it will be sufficient, no matter how much it might fall short of what would have been necessary at common law. *People v. King*, 27 Cal. 510; *People v. Dick*, 37 Cal. 277; *People v. Cronin*, 34 Cal. 191; *People v. Murphy*, 39 Cal. 52.

In section 150 of the criminal procedure act it is provided what the indictment must contain. After specifying that it must give the names of court and parties, it says the indictment must contain “a clear and concise statement of the acts or omissions constituting the offense, with such particularities of the time, place, person, and property as will enable the defendant to understand distinctly the character of the offense complained of, and answer the indictment.” A form of indictment is given. Section 151 provides that the indictment must be direct and certain as it regards (1) the party charged; (2) the offense charged; and (3) the particular circumstances of the offense.

Section 158 specifies that the indictment will be held good if it can be understood from it, (among other things not here brought in question,) so far as the description of the offense goes, “that the act or

omission charged as the offense is clearly and distinctly set forth, without repetition, and in such manner as to enable the court to understand what is intended, and to pronounce judgment upon a conviction, according to the right of the case."

To have enabled the defendant to answer the indictment, it could not have been necessary that he should have been apprised of the fact by express averment that he was a "male person;" nor could it have been necessary, as we have seen, to make him to understand the character of the offense charged, and to answer it, that the offense should have been otherwise or more particularly described than has been done. The offense is clearly and distinctly set forth,—there is no repetition,—and it is set out in a manner sufficient to enable the defendant and the court to understand it, and to guide the court in pronouncing judgment.

If appellant thought the indictment defective in either respect, he should have demurred. Crim. Proc. Act, § 192, (Laws Utah 1878, p. 101.) The defects were such as could have been reached by demurrer. As appellant did not demur, he waived his objections. Section 200, Crim. Proc. Act; *People v. Swenson*, 49 Cal. 388. By said section 200 it is provided that all objections mentioned in section 192, authorizing demurrer, if they appear on the face of the indictment, can only be taken advantage of by demurrer, except that the objection to the jurisdiction of the court over the subject-matter of the indictment, and the objection that the facts stated do not constitute a public offense, can be taken at the trial, under the plea of not guilty, or after trial in arrest of judgment. The objections urged are such as appear on the face of the indictment, and neither objection goes to the jurisdiction of the court. If, then, the indictment alleges facts sufficient to constitute a public offense, it is sufficient, and there is no remaining objection to the indictment that the appellant can raise after having failed to demur. We have already seen that a public offense was clearly and concisely alleged. The appellant, however, raised the objections at the trial, claiming that the indictment was too defective to allow of the admission of any testimony under it. Yet, from what we have said, it plainly appears that there were no grounds for the objections, and that if there were they had been waived.

We are brought now to the consideration of the alleged errors in excluding testimony offered by the defense. Several questions were by the defense asked a witness for the prosecution, which were objected to by the prosecution as irrelevant, immaterial, and incompetent. The avowed object of these questions, as stated by the defense, was to show, or tend to show, non-access during the time charged, and as tending to disprove any presumption of sexual intercourse which might be raised by the testimony of the witness. The objections were sustained. The defense made an offer of proofs, the gist of which was to the same effect. Part of the offer was wholly hear-

say, where he sought to show what was told the woman; a large part was wholly made up of admissions; and the residue bore upon the question of sexual intercourse and occupying the same bed. We have already seen in this opinion that sexual intercourse was not a necessary element in the crime. If it were an element,—a necessary element, as the defense claim,—then the prosecution might have shown that the defendant and these women lived together in the same house and company, that they were continually walking, talking, and acting as if husband and wife, treating each other so before their neighbors and the public generally, calling each other husband and wife respectively, having all their dealings before the world as if husband and wife; he might be providing for all her wants of clothing, food, house, and household affairs, and claim the women as his wives, and doing many more like things, and yet, if the prosecution did not prove that defendant had sexual intercourse with these women, the prosecution would have to fail. The prosecution would have to prove adultery, when adultery was not charged; would have to prove fornication, and lewd and lascivious cohabitation, when none of these charges had been made, and all such offenses had been purposely left out of the act by the law-making power. It seems to us preposterous that congress could ever have intended such a thing when the law was enacted. Congress never could have intended to include those things which it purposely excluded. If the sexual intercourse and bedding together were not parts of the offense necessarily, what advantage could it be to a defendant to disprove the existence of such things, especially when it would be the duty of the court—and it was done in this case—to instruct the jury that sexual intercourse and bedding together were not necessary parts of the offense. What is the advantage of introducing in evidence facts which immediately thereafter the court will have to rule out, or declare of no importance. We do not think that the defendant could in any way be harmed by the rejection of such evidence. Its admission would not disprove, nor tend to disprove, any testimony by the prosecution. It would only tend to disprove that which the court correctly instructed the jury was not important.

The appellant urges as error the refusal of the court to give instructions asked by him. There were 24 such instructions, between many of which there was but a shade of difference. The first and second of these instructions affirmed the existence of the Edmunds act, and its applicability to this territory. They were wholly immaterial and irrelevant. Their rejection could in no way have affected the result. The jury take the law from the court, and it is not their province to know or be informed where the court obtained the law. The third rejected instruction—having reference to the non-applicability of the act to persons cohabiting with lawful wives—has no application to the evidence in the case. The fourth, fifth, sixth, seventh, eighth, ninth, eleventh, eighteenth, and twenty-first have direct

reference to sexual intercourse, and are wholly outside of the case, and not applicable. The thirteenth is misleading—it has reference to fathers not being compelled to break off all communications with the mothers and the children. It would indirectly lead the jury to believe that the acts of the defendant in regard to the women were perfectly justifiable. Nos. 14, 15, 16, and 17 have reference to the evidence of the relationship existing between the defendant and the women at and prior to the passage of the Edmunds act, and indirectly raise the question as to the competency of such evidence.

In California a man was being tried for the alleged murder of his wife. A witness, upon being questioned, said that about *a month before* the homicide the deceased wife came to her house greatly excited, and when she came, the defendant in the case had been heard swearing and breaking doors, windows, and other things in his own house, and that this was going on for some time. The defense objected to the testimony, but it was admitted; the court holding the admission proper, and that these circumstances, although occurring some time before the homicide, taken in connection with the circumstances of the homicide, were proper for the consideration of the jury; that these facts tended to show the feeling of the defendant towards his wife, and his treatment of her, although this was before the homicide, and in some degree they tended to show a motive for taking the life of the wife. *People v. Kern*, 61 Cal. 244.

The case of *Badger v. Badger*, referred to by the defense upon another point, recognizes the doctrine that a meretricious intercourse in the beginning is presumed to continue, unless there be evidence of a change. 88 N. Y. 546; *Thayer v. Thayer*, 101 Mass. 111. The principle of these cases applies to the case under consideration.

The evidence of what occurred prior to the date alleged in the indictment, and prior to the passage of the law, was proper for the consideration of the jury, and the jury were, notwithstanding, instructed that they must presume the defendant to be innocent until the contrary be shown. It is not proper nor necessary (although it is sometimes done when no objection is offered) to tell the jury specially that they were at a particular time, and before the time alleged in the indictment, to presume him innocent; but the charge of the court covers all time down to the closing of the case by verdict. Such charge of the court could not have misled the jury, for they find the defendant guilty as charged, and he is charged with an offense between certain dates. The rejected instructions could have done the defendant no good; their rejection certainly did him no harm. It is, no doubt, error to refuse to give an instruction asked, and which is material, and has not been given in or covered by the charge; but it is not error to refuse immaterial requests. *People v. King*, 27 Cal. 507; *People v. Kelly*, 28 Cal. 423; *People v. Strong*, 30 Cal. 151; *People v. Lachanais*, 32 Cal. 433; *People v. Ah Kong*, 49 Cal. 6.

The tenth instruction asked by defense and refused, has reference

to what rule the court should adopt in the interpretation of the statute. It might properly be addressed to the court, but it was a matter with which the jury had nothing to do. The twelfth instruction refused, had reference to the legitimizing of polygamous children. It was wholly irrelevant and immaterial. The twenty-second, twenty-third, and twenty-fourth instructions refused, have reference to the necessity of showing marriage or marriage ceremony. No ceremony of marriage is necessary to be shown in this class of cases. The instructions were therefore irrelevant and immaterial. The twentieth refused instruction, relating to the holding out of Clara C. Cannon as wife, is covered by the charge given. In some of the instructions refused there may have been isolated sentences that were proper, but we think that in every such instance it is covered by the charge.

The next error assigned is the giving of the instructions by the court, as embraced in the charge. The court gave the time within which the offense was charged to have been committed, and stated what the charge was, and then detailed in general terms classes of circumstances which would, if proven, make out such a case as would authorize the jury to find defendant guilty. The court charged upon the question—the most vital in the whole case—the question of sexual intercourse—and correctly so charged; and the court reminded the jury of the presumed innocence of the defendant, and that they were the judges of the credibility of the witnesses, etc. We cannot see wherein the court has failed to cover the whole case in the charge. If there be any errors at all, they are unimportant, and for such errors courts will not reverse. *People v. Varnum*, 53 Cal. 630. The charge must be taken as a whole, and if it fairly and correctly presents the law bearing upon the issues, the appellate court will not disturb the judgment. *People v. Hortado*, 63 Cal. 288; *People v. Welch*, 49 Cal. 174. It is, on the defendant's motion for new trial, urged that the verdict should have been set aside because one Johnson, a juror, was a bigamist. The affidavits as to incompetency are not embraced in the bill of exceptions, and hence are not properly before us. *People v. Stonecipher*, 6 Cal. 405. But if they were, the verdict could not be set aside. *People v. Lewis*, 5 PAC. REP. 543; Laws Utah 1878, § 188.

For the reasons stated throughout this opinion, it is apparent that the overruling of the motion for a new trial was proper, and the judgment was correct.

The order and judgment of the court below are affirmed.

ZANE, C. J., concurs. POWERS, J., concurs in the result, and files his opinion on the case.

POWERS, J. Although I agree with the majority of the court in the construction of the word "cohabit," as used in the "Edmunds Act," so called, and also in the result reached, I am unable to concur in the conclusion that there is no error in the record, and I have there-

fore deemed it proper to express my views as to the whole case. The indictment charged that the defendant, "Angus M. Cannon, late of said district, (the third,) in the territory aforesaid, to-wit, on the first day of June, in the year of our Lord one thousand eight hundred and eighty-two, and on divers other days, and continuously between the first day of June, A. D. 1882, and the first day of February, A. D. 1885, at the county of Salt Lake and territory of Utah, did unlawfully cohabit with more than one woman, to-wit, one Amanda Cannon, and one Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the United States in such case made and provided, and against the peace and dignity of the same."

The main controversy arises over the construction of the word "cohabit." The prosecution contend that it means, to dwell together as husband and wife; that it does not necessarily include intercourse between the sexes; and that the law clearly distinguishes "matrimonial cohabitation" from "matrimonial intercourse." Upon the part of the defendant it is contended that all cohabitation which the law deals with is sexual cohabitation; that the word as used means a dwelling together by male and female adult persons in the intimacy of husband and wife, and that sexual intercourse is necessarily implied. Eminent counsel have argued the case with marked ability, and its importance, not only to the defendant, but also to the people, demands that it should receive the most careful consideration of this court.

1. In order to correctly understand what is meant by the statute when it says, "if any male person in a territory * * * hereafter 'cohabits' with more than one woman, he shall be deemed guilty of a misdemeanor," let us endeavor to ascertain what was the object that congress had in view in the passage of the act, what was the evil it sought to remedy, and what was the mischief it aimed to suppress.

If we consider the evident purpose of the "Edmunds Act," and view it in the light of the exigency which caused its enactment, the conclusion seems inevitable that its purpose and intent is to protect monogamic marriage. It does not appear that its aim is to punish mere sexual crimes. This seems to have been the view taken by congress. See Cong. Rec. March 15, 1882, p. 34. But, however that may be, it seems to be the view that is supported by reason and authority.

Marriage, as understood in Christendom, means the "voluntary union of one man and one woman, to the exclusion of others." The them, therefore, is not correctly applied to the union of one man with more than one woman. Story, Conf. Laws, (8th Ed.) 184, note. It is the parent and not the child of society, for it is the very basis of the whole fabric of civilized society. Story, Conf. Laws, 185. It is something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the

parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belongs to ordinary contracts. Story, *Confl. Laws*, 185. No legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it upon the basis of the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. *Murphy v. Ramsey*, 114 U. S. 45; S. C. 5 Sup. Ct. Rep. 747. Marriage is the foundation of the home, and upon it is builded the entire superstructure of society. It finds its defense in every human heart, which jealously guards the one object of its affection. It is the outgrowth of progress and enlightenment, for it recognizes that the wife and mother is the equal of the husband and father.

There is far more to the marriage relation than the mere gratification of passion, or the procreation of children. The wife, taking her place by her husband's side, his equal, his counselor, his friend, makes of him a perfect man. Together they share the sorrows of life; together they enjoy its blessings. When each is true to the other, they present a union not made by man, and as they pass along life's pathway their very example is of infinite benefit to mankind. Anything which tends to bring this relation into disrepute is an injury to the world. Anything which lowers the popular appreciation of the relation, and destroys the good that marriage does the world by mere example, is an evil which the law should correct. Society, with all its ramifications, being founded upon marriage, it is upon grounds of public policy that it is regulated and protected. When the act in question was passed, congress was aware that in some of the territories there are people who believe that it is right for a man to take and live with more than one wife; that there are men who not only marry more than one woman, but who say to the world, by conduct and by words, that two or more women with whom they are living are their wives. The law-making power saw that the mere fact of a plural marriage is an evil example; that the living and associating with two or more women as if married to all, tends to weaken the popular appreciation of true marriage, and this is detrimental to society. Therefore, for the purpose of protecting the marriage relation, the law under discussion was passed. It is directly aimed at the suppression of polygamy and the polygamous household as an evil example, dangerous in its tendency to the family relation as recognized by this nation. It was not the offense against chastity merely, but the offense against the family, which congress intended to suppress. To accomplish its object the law has several provisions. It provides for

the punishment of offenders by the courts, and by restricting their political privileges. It will be necessary to refer to two or three of its sections.

"Section 1. Every person who has a husband or wife living, who, in a territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage, whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, on the ground of nullity of the marriage contract."

Under this section, "the crime of bigamy or polygamy consists in entering into a bigamous or polygamous marriage. Continuing to live in that state afterwards is not an offense, although," as we shall see later on, "cohabitation with more than one woman is." *Murphy v. Ramsey*, 114 U. S. 42, 43; S. C. 5 Sup. Ct. Rep. 747. As will be seen from the construction placed upon this section by the supreme court of the United States, and quoted above, it is the fact of marriage with two or more persons that constitutes the offense. It is plain that the first section of the act deals simply with the marriage relation. This section does not punish offenders for cohabitation or sexual intercourse, but for entering into a bigamous or polygamous marriage. *Id.* Proof of the marriage is all that is essential. The third section of the act reads as follows:

"Sec. 3. That if any male person, in a territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court."

When these two sections are read together they seem plain. One makes the fact of marriage an offense, without reference to cohabitation or sexual intercourse; the other makes unlawful the cohabitation, or appearance of marriage. Previous to the act becoming a law, many had contracted bigamous or polygamous marriages, and were living with their wives. The object of the third section obviously is to put an end to polygamous establishments. It was designed to meet cases which the first section could not. Many prosecutions for polygamy might be barred by the lapse of three years, by section 1044, Rev. St. of the United States, and yet a man might be living with more than one woman as a husband lives with his wife, and, by his example, be doing the public positive injury. The fact whether he does or does not have sexual intercourse with the women with whom he is associating as a husband associates with his wife, is a matter of

but little moment when compared with the greater wrong done to society. Another section of the statute I quote :

"Sec. 7. That the issue of bigamous or polygamous marriages, known as Mormon marriages, in cases in which such marriages have been solemnized according to the ceremonies of the Mormon sect, in any territory of the United States, and such issue shall have been born before the first day of January, Anno Domini eighteen hundred and eighty-three, are hereby legitimated."

Thus, by these provisions, congress says, in substance, there must be no more plural marriages. The children born or begotten at the time of the passage of the act are legitimate, but hereafter they are illegitimate; and no male person can live with more than one woman as his wife. It would seem that the word "cohabit" implies or means no more than the outward appearance of living with two or more women as a husband lives with his wife. If this is so, then the prosecution, in order to make out a case, are not required to satisfy the jury that the parties indulged in sexual intercourse. Neither would it be a defense for a man accused of unlawful cohabitation to prove that he did not indulge in sexual intercourse with the women whom he held out to the world as his wives, or, in other words, with whom he cohabits.

2. The defendant claims that there are two defects in the indictment: (1) That it fails to show that the defendant is a "male person." (2) The indictment does not allege that the defendant put forth any pretense of marital relation to the women therein mentioned. I agree with my brethren that the indictment is sufficient. The sex is sufficiently shown, if that is necessary, by the name Angus. I think it would not mislead the defendant, and it is not claimed that he is not the man named. The precise words of a statute need not be followed in order to make an indictment valid. The indictment follows the language of the act in describing the offense. This seems to be sufficient, particularly in statutory misdemeanors, and it may be laid down as a general rule to which there are few exceptions. *State v. Rust*, 35 N. H. 438; *U. S. v. Mills*, 7 Pet. 138, (432); *U. S. v. Gooding*, 12 Wheat. 460, (281); 1 Whart. Crim. Law, § 364; *Romp v. State*, 3 Greene, (Iowa,) 276; *Chambers v. People*, 4 Scam. 351; *State v. Ragan*, 22 Mo. 459; *State v. Mitchell*, 6 Mo. 147; *Simmons v. State*, 12 Mo. 268; *Whiting v. State*, 14 Conn. 487; *People v. Colton*, 2 Utah, 457; *People v. Thompson*, 4 Cal. 238; *People v. Saviers*, 14 Cal. 29; *People v. Martin*, 32 Cal. 91; *People v. Cronin*, 34 Cal. 191, 208. Besides, the defendant failed to demur specially, and if there was any defect it was waived. Crim. Prac. Act, § 200. But there does not appear to be any defect, as the indictment clearly meets the requirements of the criminal practice act. See Crim. Prac. Act, § 158.

3. On the trial, Clara C. Cannon was sworn as a witness for the prosecution. She testifies as follows :

"I know the defendant. I have been his wife. I was married to him about ten years ago, and have since lived at 246 First South street, Salt Lake City.

I live there now, and have lived in the same house since shortly after I was married. The defendant has lived in the same house part of the time, and in the same house during the past three years. I have one living child which was the child of that marriage, born January 11, 1882. I have had two other children by that marriage, both born before the living one. In this house I occupied two rooms on the ground floor,—a parlor and a dining-room, on the east side. My kitchen is back, not attached to my part of the house. I have occupied this part of the ground floor since I first went to live in the house. There is a hall running through the house on the ground floor, and the rooms I occupy on that floor are on the east side of the hall. I know Amanda C. Cannon. She has lived in the same house that I live in during the past three years. She has occupied on the ground floor two rooms on the west side of the hall, besides her kitchen, which is attached to the back of the main building, and is not the kitchen I use. I suppose Amanda Cannon is defendant's wife. I have heard him speak of her as his wife, as Mrs. Cannon, and she has lived in the same house ever since I went to live there. She has nine children, I think. During the past three years I think all her children have been living there at home, but not all the time. My child lives with me in my part of the house,—I mean the child of this marriage. The children of Amanda Cannon live with her in her part of the house. During the past three years, and prior to the month of February, in this year, the defendant has been in the habit of taking his meals with me, in my part of the house, a portion of the time,—about one-third of the time. There were stated intervals. He took his meals with me every third day,—with me and my children. I have a son and daughter grown up, and two orphan children. He took his meals with me and the child of this marriage and the other children every third day. He took his meals with Amanda Cannon and her family one-third of the time. He took all three of his meals with me every third day. On week-days and on Sunday morning he had breakfast at my house; that is, he took his meals with me two days of each week, and also his breakfast Sunday morning, which made one-third of the time. On Sunday he took his dinner at Sarah's, and his supper at Amanda's. There are four rooms on the second floor of the house, used as bed-rooms, and a hall, with two of the rooms on either side of it. The rooms open into the hall. During the past three years I have occupied the bed-room in the north-east corner, and Amanda has occupied the one in the south-west corner of the house. The defendant has occupied the bed-room in the south-east corner. The room occupied by me as a bed-room and the one occupied by defendant as a bed-room are on the same side of the hall, and there is no intervening room."

On cross-examination the witness was asked by counsel for defendant several questions, the purpose being, as stated, as "tending to show, with other evidence to be given, non-access during the time charged in the indictment, and as tending to disprove any presumption of sexual intercourse which might be raised by the testimony of the witness." The prosecution objected to each question, on the ground that it was immaterial, irrelevant, and incompetent. The court sustained the objection, and defendant excepted.

I think there can be no question but what this testimony was admissible. True, the fact that the defendant did not have intercourse with these women would not be a defense, but, in view of the evidence elicited by the prosecution, it became proper. The court, in his charge, could have instructed the jury as to the weight to be given to this evidence. We must remember that these questions were asked in cross-

examination, and that great latitude is allowed. We must bear in mind, also, that the prosecution had shown on the direct examination that the defendant occupied a bed-room adjoining that of the witness, there being no intervening room. The evident purpose of the prosecution in eliciting this testimony was to enable the jury to infer that the parties enjoyed sexual intercourse. That is the natural inference that would be drawn from such testimony, and the defense were entitled to rebut it. That the prosecution understood that such an inference would be readily drawn, is shown by their brief in the *Musser Case*,—a similar case to this, and argued at the same time. In that brief, speaking of the proof showing cohabitation, it is said. "His (Musser's) bed-room is between the bed-chambers of the women, and open doors afford ready and easy access to the marriage beds." It is plain that the testimony is open to the inference that I have drawn from it.

On cross-examination, anything that will explain, modify, or cut down the testimony drawn out on the direct is proper. "A party always has the right to call out on cross-examination any fact within the knowledge of the witness which has a tendency to affect or qualify the evidence he has given in chief, whether it points to the same circumstances about which he testified or not. A more restricted rule renders cross-examination in many cases nearly valueless, and enables a party, by careful questions to his witness, to give to the jury a one-sided and partial view of the facts within the knowledge of the witness, and effectually to preclude the opposite party from supplementing the witness' statement with the further facts within his knowledge concerning the same transaction, unless he shall make the witness his own, in which case he is supposed to vouch for him as credible, and has also a less privilege of searching examination." *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 100.

4. With regard to the charge of the court, the error lies, not so much in what the judge did say, as in his failure to say what he ought. This case belongs to a class that creates great public interest. Men have strong prejudices, and are prone to follow their prejudices, whether they are fully borne out by testimony or not. Therefore, a court, which should always be fair, always be calm, and, no matter what the public may demand, should always mete out impartial and even-handed justice, should carefully throw about a defendant the safeguards to which the law says he is entitled. The charge to the jury was remarkably brief. It was as follows:

"The indictment in this case charges that the defendant, on the first day of June, in the year of our Lord, 1882, and on divers other days continuously, between said first day of June, 1882, and the first day of February, 1885, did unlawfully cohabit with more than one woman, to-wit, one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon. If you believe from the evidence, gentlemen of the jury, beyond a reasonable doubt, that the defendant lived in the same house with Amanda Cannon and Clara C. Cannon, the women named in the indictment, and ate at their respective

tables one-third of his time or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives, you should find him guilty. It is not necessary that the evidence should show that the defendant and these women, or either of them, occupied the same bed, or slept in the same room; neither is it necessary that the evidence should show that, within the time mentioned, he had sexual intercourse with either of them. I will state, the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; that you are the judges of the credibility of the witnesses, the weight of the evidence, and of the fact; and if you find the defendant guilty you will say in your verdict: 'We, the jury, find the defendant guilty, in manner and form as charged in the indictment;' and if you find him not guilty, you will say: 'We, the jury, find the defendant not guilty.'"

The foregoing comprises the entire charge from beginning to end. The court should have informed the jury that this prosecution was brought under the provisions of the "Edmunds Act," and they should have been informed when that act took effect. They should have been told that prior to the passage of that act cohabitation was not an offense. The word "cohabit" should have been defined, and the jury instructed that unless they found beyond a reasonable doubt that the defendant had cohabited with the women named in the indictment since the "Edmunds Act" took effect, and within the time named in the indictment, they should acquit. The defendant requested instructions on all these points, and they were refused. This refusal was error, for it is the duty of the judge, when requested, to instruct the jury upon every point of law pertinent to the issues. *People v. Taylor*, 36 Cal. 255; *Hays v. Paul*, 51 Pa. St. 134. A party has the right to have the jury instructed upon the law of the case clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake, and it is error to refuse to instruct, when requested, upon points pertinent to the issue. *Muldowney v. Illinois Cent. R. Co.* 32 Iowa, 176; *Carpenter v. State*, 43 Ind. 371; *Morris v. Platt*, 32 Conn. 75; *Nels v. State*, 2 Tex. 280. As far as the evidence goes, the judge should give any pertinent instructions asked for conformable to the law. *State v. Wilson*, 2 Scam. 225; *Davis v. State*, 10 Ga. 101. He need not adopt the language of counsel asking the instruction, but if the form and substance are not objectionable it is better so to do. Bish. Crim. Proc. § 981. Any explanation may be added; or, of course, any modification of its terms may be made. *Lambeth v. State*, 23 Miss. 322; Bish. Crim. Proc. § 981, and cases cited.

It is true that the court charged the jury that "the law presumes the defendant innocent until proven guilty beyond a reasonable doubt;" but the defendant was entitled to have them charged in the language of his fifteenth and sixteenth instructions, which were as follows:

(15) "The law presumes innocence, and therefore that all persons who were cohabiting when the Edmunds law took effect, contrary to the provisions of that act, then ceased to do so."

(16) "No fact in the conduct of the defendant, subsequent to the passage of the Edmunds act, can be made more significant of guilt in violating the

section against cohabitation, by reason of the existence of the polygamous relation between him and the women mentioned in the indictment prior to the passage of the statute."

A general abstract statement that the law presumes innocence is not equivalent to a specific instruction that the law presumes innocence in a particular predicament shown by the evidence.

So, also, the last half of the thirteenth request should have been given. That instruction was:

"That all the defendant's social familiarity with the mothers of such families, established prior to the passage of said act, not shown to include all the particulars of cohabitation, as the court has defined it, should be considered by the jury, with the legal presumption of innocence, and the failure to establish such cohabitation would entitle the defendant to acquittal."

Evidence had been introduced of matters occurring prior to the passage of the law. The jury should therefore have been told that to find the defendant guilty they must find that he had cohabited with the women named, within the time stated in the indictment. They were told that the defendant was charged with cohabiting with the women between certain days, but they were not told that they must confine their investigation of his guilt or innocence to the proof of facts and circumstances occurring between those dates. On the contrary, they were at once informed that if they found beyond a reasonable doubt that the defendant lived in the same house with the women, ate at their tables, and held them out to the world as his wives, they should find him guilty. More restriction should have been placed upon the investigations of the jury, for no act done prior to the passage of the act can be made by that act the basis of a criminal charge. Nor can subsequent legislation make a prior act conduce to a conviction, for it would then alter the situation of the defendant to his disadvantage. *Kring v. Missouri*, 107 U. S. 221; S. C. 2 Sup. Ct. Rep. 443; *U. S. v. Hall*, 2 Wash. 366.

I have pointed out the foregoing errors, in order that they may be avoided in future trials of like nature. I think, however, that in the present case they are errors without prejudice; for, after most mature and conscientious reflection, I am not convinced that they affected the result. All of the testimony taken upon the trial is brought up with the record. After carefully considering it in all its bearings, I am persuaded that it clearly shows the defendant to be guilty as charged in the indictment. I am convinced that the verdict of the jury would not have been different than it was, even had the errors not existed. I therefore concur in the conclusion of the court affirming the judgment of the court below.

(4 Utah, 153)

UNITED STATES v. MUSSER.

Filed June 27, 1885.

1. EVIDENCE—ACT OF CONGRESS AGAINST POLYGAMY—PROOF REQUIRED TO ESTABLISH THE CRIME.

The crime of unlawful cohabitation, as defined in the act of congress of March 22, 1882, is made out without proof of sexual intercourse, and such proof constitutes no defense.

2. PRESUMPTION OF INNOCENCE—INTENT OF PARTY, HOW CONSIDERED.

If a lawful relationship is formed, and its continuance is made unlawful, the law presumes that the parties intend to obey the law, and that they terminate or change the relationship so as to make it conform to an innocent intent.

3. SAME—MARRIAGE ENTERED INTO BEFORE THE STATUTE.

Evidence is admissible to show marriage between the defendant and the women named in the indictment before the law took effect, or to show that defendant before that time cohabited with those women.

POWERS, J., dissenting.

Dickson & Varian, for the United States.

Arthur Brown, Sutherland & McBride, Bennett, Harkness & Kirkpatrick, and *F. S. Richards*, for appellant.

ZANE, C. J. The defendant was indicted for unlawful cohabitation with Belinda Pratt Musser, May Musser, and Annie Segmiller McCullough Musser, to which indictment he pleaded not guilty. The issue was tried by a jury, who found him guilty as charged. A motion for a new trial was overruled, and he appealed to this court. On the trial the defendant, by his counsel, alleged errors of law and of fact. The more important of the former was made by the court, it is claimed, in defining the crime of which the defendant was convicted. The offense is described in the third section of "An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," approved March 22, 1882. It is as follows: "If any male person in a territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor." The court below held that sexual intercourse was not essential to the crime. In that the defendant insists there was error, that it is a necessary element, and must be proven.

The term "cohabit," as found in the criminal codes of many of the states, is coupled with and qualified by the adverbs "lewdly," "lasciviously," "adulterously," or some other equivalent expression. No such word or expression is found in the section under consideration, or in the act of which it is a part. As defined by lexicographers, "cohabit" means to dwell with or reside together. It may mean residing in the same country, city, or neighborhood, or in the same family, or the dwelling together in lawful wedlock. This would be lawful cohabitation. Or it may mean the dwelling of a man and woman together ostensibly and apparently in wedlock, when, in fact or in law, no marriage exists; and, without proof of adultery or fornication, this would be unlawful cohabitation. Or it may mean the living together

of a man and woman, without lawful marriage, in the practice of fornication or adultery. This would be lascivious, lewd, or adulterous cohabitation,—another species of unlawful cohabitation. In this last case, proof of adultery or fornication is necessary to make out the offense. The ideas which accompany the use of the word determine its import. The ideas of country, of family, of marriage, of the appearance of marriage, (without it,) or of adultery, when associated with the term, vary and determine its meaning in each case. The subject to which it is applied contracts or expands its meaning. It is a word of flexible signification.

"Cohabitation," as used in a matrimonial sense, means to dwell together as husband and wife. *Forster v. Forster*, 4 Eng. Ecc. R. 359, was a case of divorce. In the opinion the court used the following language: "Most certainly what Dr. Harris has said is true, that the duty of matrimonial intercourse cannot be compelled by this court, though matrimonial cohabitation may." The court made a very plain distinction between matrimonial cohabitation and matrimonial intercourse. The same distinction was made in the case of *Nash v. Nash*, Id. 357, and in *Orme v. Orme*, 2 Eng. Ecc. R. 354. In a note to section 777, Bish. Mar. & Div. the author says:

"I am not aware that other judges (referring to a remark of Chancellor WALWORTH) have often employed this word to denote actual sexual intercourse, further than may be presumed from the dwelling together in the same house of parties under the claim of being married, or as necessarily implying even an occupancy by the husband and wife of the same bed. The words 'matrimonial cohabitation' have been used in distinction from 'matrimonial intercourse,' to signify a living together in the same house without copulation."

To the same effect is the case of *Calef v. Calef*, 54 Me. 365, and *Yardley's Estate*, 75 Pa. St. 207. *Ohio v. Connoway*, Tapp. 90, was a criminal prosecution. In charging the jury the court read the statute defining the crime, which was: "If any married man shall hereafter desert his wife, and live and cohabit with any other woman in a state of adultery," etc.; and remarked: "The defendant must not only have lived and cohabited with this female, but he must have lived and cohabited with her in a state of adultery." In this the court indicated clearly that it did not understand the word "cohabit" to embrace sexual intercourse, when not qualified by some expression showing such an intention. Counsel, in their briefs and arguments, made reference to numerous other cases, but it is found that the most of them interpreted or construed statutes containing qualifying terms.

We are of the opinion that the weight of authority is to the effect that the crime of unlawful cohabitation, as defined in the statute under consideration, is made out without proof of sexual intercourse, and that such proof constitutes no defense. In the statute but two crimes are defined. The first section defines polygamy; the third unlawful cohabitation; the fourth provides that the offenses may be joined in the same indictment; the fifth makes the fact that a man

summoned as a juror who is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or the fact that he is or has been guilty of either offense, or the fact that he believes that either of such offenses is right, a ground of challenge. And the eighth section disqualifies those persons who are living in the practice of polygamy, or unlawful cohabitation, from voting or holding office. Cohabitation with more than one woman is essential to the crime. If the law was aimed at adultery, why require the cohabitation to be with more than one woman. If the national legislature had so intended, it would have given some intimation of that intent in the law. It appears plain that the intention was to protect the monogamous marriage by prohibiting all other marriage, either in form or in appearance only, whether evidenced by a ceremony, or by conduct and circumstances alone.

The court should ascertain the intention of the legislature from the words used, when plainly expressed. But when the meaning of the words is obscure and doubtful, and the intention of the law-maker is uncertain, it becomes the duty of the court to resort to rules of construction in order to discern the idea which the language was intended to express. In the use of rules of construction we are not confined to the uncertain language of the law, but we may take into view the ideas which the legislator associated with the idea that is in dispute; for with them it existed in the legislator's mind, and in the light of those ideas we may grasp the meaning of the law as the legislator endeavored to express it. We may assume that the authors of this law had in mind the institution of marriage, because they expressly declared that any man who, having a wife, marries another, is guilty of a crime; and that any male person who cohabits with more than one woman is guilty of unlawful cohabitation. They had in view the evil effects of such practices. The end of the law was the protection of the monogamous marriage; and the suppression of polygamy and unlawful cohabitation were but means to that end. It is proper, also, to take into consideration the conditions as the national legislature anticipated and understood them in which the law was to be applied and enforced. They knew the time had elapsed within which a very large portion of those living in polygamy could be punished for that offense, and that many of these were among the most influential men in society, being the heads of the church, and that the example of their continuing to live with their plural wives under a claim of divine right would be a scandal to society and a menace to the lawful marriage; that such examples would be a continuing invitation and apparent justification for their followers to either secretly or openly violate the law. Congress therefore forbade plural marriage in appearance only, as well as in form, and by the example of punishment it doubtless intended to eradicate the example of apparent plural marriages, as well as the plural marriage in form.

According to the maxims of sound interpretation for use in search-

ing for the intention of the legislature, it is proper to ask, what was the defect and mischief against which the law did not provide, and the true reason of the remedy? And it is the duty of the court at all times to make such construction as shall suppress the mischief and advance the remedy. Potter's Dwar. St. 184. Whether we interpret the terms used according to their legal sense, or resort to the rules of construction, and construe them in the light of the reason and the purpose of the law, and of the conditions in which its authors understood it was to be applied to human conduct, we reach the same conclusion.

The defendant also insists that the evidence before the jury did not prove him guilty. This raises a question of fact; to determine which it is necessary to examine the evidence.

Annie M. Sheets, a daughter of defendant by a deceased wife, married and not living at home, testified that she had known the women named in the indictment, Mary Musser, Annie Segmiller McCullough Musser, and Belinda Pratt Musser, several years. That Belinda and Mary lived in defendant's house. That the former lived there about one year and a half, and moved to the house she now lives in about four months ago. That Annie Segmiller Musser lived in a house on an adjoining lot. That they all three have children, who bear the name of Musser, living with them. That Belinda has three; two of them bear the name of Musser. That she never heard the younger called any name but Arthur. That there were eight children in the house; one of them, Blanche Musser, is between two and three. That Annie Segmiller McCullough Musser has three children, from five to eight, who go by the name of Musser. That defendant called them by their given names, and they addressed him as father. That the defendant, her father, lived in the same house with Belinda and Mary; witness did not live there herself, but visited. Had seen him at the table with Mary, in the house in which Belinda and Mary lived. That the house had eight rooms on the ground floor and four on second. The rooms down stairs connected by doors. Belinda's bedroom was on the west side, Mary's on the east, defendant's between; from his a door opened into Belinda's; between Mary's and his was another room having doors which opened into theirs. That the older children slept up stairs and the younger ones down. Had heard defendant refer to Mary as witness's step-mother, and heard Mary's children address him as father. That she did not know where Arthur was; last saw him four or five months ago, at his mother's house; nor does she know where Mary is. The women named in the indictment have been for several years past recognized and known in the Musser family as defendant's wives.

Lizzie Lee testified that she was a married daughter of Annie Segmiller, now known as Annie Segmiller Musser. That Belinda Pratt Musser and Mary Musser lived in a house on a lot adjoining her mother. That she knew defendant. That her mother has five chil-

dren; did not know how old Ross, the younger, is; last saw him between four and five weeks ago, when attention was called to her statement before the grand jury, she said between two and three years old. That he was not an infant in arms when she last saw him. That she saw defendant at her mother's house about a week ago; her mother was not there; has not seen her for four or five weeks; last saw the child in her arms. That she had seen defendant at her mother's four or five weeks ago. That her mother is recognized by her and her mother's family as defendant's wife; had heard them speak of the children in presence of each other, though not as his. That her mother's children were named Musser. Witness has one full brother and one sister; their name is McCullough; had heard her mother's other children speak to defendant and of him as father. That her mother's maiden name was Segmiller; she married McCullough, and she now goes by the name of Musser; had seen defendant at her mother's a number of times, in the evening and morning. Witness lived beside her mother, and, since last August, at her house.

Mary Rideout testified that she had seen Mary Musser's children. That the youngest she saw was two or three years old; had not visited her for three years. That she had seen Belinda Musser's child; when she saw it, it appeared to be something over a year old; was an infant nursing; it was a nursing infant in arms last winter—three or four months ago. That witness had seen defendant quite lately about the house. That she traveled with Annie Musser, and defendant met her at the carriage; she had her baby with her. This was last summer.

Joseph Warburton testified: Knew Belinda and Mary Musser, and the house in which they lived; was at the house; saw defendant there, and going to and coming from the house, driving into the barn. That children bought articles at store and defendant paid for them. That most of the children were Mary Musser's; saw defendant walking and choring around his premises.

M. F. Ekels testified that prior to the sixteenth of last October, lived at Mary Musser's about a year and four months, boarding there. That defendant was there at meals; he sat at one end of the table there nearly all the time. That he ate at Belinda's table once. The occasion was a birthday party. Defendant was there. That Mary Musser had six children; the youngest is an infant running around; whether it was a year ago do not remember. Its name is Blanche. That he knows Annie Segmiller McCullough Musser. Witness is a school-teacher; went to see her about children she was sending to school. One of Belinda's also went, and some of Annie's,—all went on the roll by the name of Musser. That Mary Musser paid tuition for all the children who came under the name of Musser. Defendant offered in evidence three deeds which had been recorded, in which he was grantor, bearing date July 21, 1883. Mary Musser was grantee in the first, Belinda Pratt Musser in the second, and Annie

Segmiller Musser in the third. That Belinda Musser moved to the house she now lives in last December.

From the foregoing evidence it appears that the women named in the indictment have for years borne his name, and before that they had borne other names; that for more than one year next preceding December last, defendant had lived in the house with Mary Musser and Belinda Musser; that these two women and defendant occupied bed-rooms on the same floor; that a door opened out of defendant's room on the east directly into Belinda's room, and on the west into a room which opened into Mary's; that he ate a large portion of the time at her table; that the third woman lived in a house on an adjoining lot; that defendant was frequently there; that Mary has six children, the youngest two or three years old, and Belinda three, the youngest two or three years old; that Annie has three children, ages between five and eight years; that these children all bear the name of Musser, and have addressed him as father, and that all three of the women are known and reputed in the family to be defendant's wives. It is undeniable, in view of the evidence, that defendant lived a large portion of the time, charged in the indictment, in the same house with two of the women, and all the time in a house adjoining the other woman, at whose house he was frequently. What relationship did he bear to these women with whom he was living? Was it the relationship of father and daughter, brother and sister, employer and employe, master and servant? Neither of these questions can be answered in the affirmative, in the light of the evidence. The evidence points to but one relationship, and that is matrimonial—husband and wife; the evidence can be reconciled on no other hypothesis. To consider a portion of the evidence apart from the rest is not the right way to determine its sufficiency; a portion may not establish the disputed fact, but all together may prove it beyond a reasonable doubt. A portion of a physical structure does not prove its existence, but when all the parts are taken together there can be no room to doubt its existence. When all the evidence in this case is so considered, we are of the opinion that it sufficiently appears that defendant, during the time mentioned in the indictment, was living with at least two of the women named, in the apparent relation of marriage; that by his language, and conduct, and appearances, and expressions, for which he was responsible, he held out to the world that relationship—that he was living with them in the habit and repute of marriage. We are of the opinion that the evidence was sufficient to authorize the verdict found.

Witness Lizzie Lee, who lived at the house of one of the reputed wives and her daughter, stated that she did not know where her mother was; that she last saw her four or five weeks ago. And witness Annie M. Sheets, a daughter of the defendant, who visited the house of Mary Musser and defendant frequently, testified that she did not know where Mary was. And the evidence tended to show that

two or three of the youngest children had not been seen for some time. And the assistant district attorney, in his closing argument to the jury, said that it was in the power of defendant to show all the facts in defense by his wives and children, but that it was not in the power of the prosecution to do so by them, because they had been put out of the way by the procurement of the defendant. The defendant's counsel objected to this language, and the court said there was no evidence that defendant had put them out of the way, and the assistant district attorney made no further remarks on the point. The bill of exceptions also shows that the same attorney, in his argument, stated that an outsider had made signals to the jury during the trial, and the court checked him, and he said nothing further with respect to it. The remarks were made in the heat of argument, and the attorney did not persist, but ceased as soon as his attention was called to the impropriety. The court charged the jury that in considering the verdict they should not go outside of the evidence and take into consideration facts not in evidence; that they should consider only evidence, and consider it fairly. In support of this assignment of error counsel for defendant cite a number of authorities. In some of them the trial court had permitted the prosecuting attorney to continue, over the objection of defendant. In other cases, the remarks of the state's attorney were in violation of a statute forbidding comment on the fact that defendant had not testified when the law permitted him to do so. In each of the cases cited there had been an aggravated breach of professional duty and obligation, to the injury of the defendant. In view of the circumstances attending the statements of the assistant district attorney, and of the fact that he ceased further remarks as soon as his attention was called to the impropriety, and of the charge of the court, and of the authorities, we are of the opinion that this exception is not well taken.

The indictment charges that the defendant unlawfully cohabited with the women therein named, between the first day of May, 1882, and the first day of April, 1885. And the defendant insists that it was error to admit evidence of defendant's conduct and of his relationship to them before the day first mentioned. The offense of the defendant consisted in dwelling with the women in the habit and repute of marriage, holding that relationship out to the world by his language and conduct, or by expressions and conduct, for which he was responsible. That he lived in the house with two of them during the time mentioned, there is no room for controversy. And the question is, what relationship existed between the defendant and these women? Was defendant there as a guest? As a boarder? Was he the proprietor of the house, and the women in his employ as servants,—chamber-maids or cooks? Were they his sisters? Was any one of them his mother? Or were they there as his wives? Does not his conduct before the offense charged throw light upon the inquiry? Evidence of the feelings and intent of the defendant with respect to

the crime, and towards the injured party, is competent in cases of murder and other crimes which may be committed by a single act. It would appear to be more pertinent when the offense consists of a succession of acts and expressions extending through a considerable period, and indicating the relation of marriage. That relation is usually preceded and attended by affections and feelings peculiar to it, and more permanent in their character, and they give rise to conduct indicating their existence, and thereby indicating marriage. Evidence that defendant had married the women,—had been living with them as his wives before the offense,—adds weight to the circumstances pointing to unlawful cohabitation during the time the offense is charged.

It is further insisted that the court erred in admitting evidence tending to show marriage to the women named before the law which the defendant is charged with violating took effect, and that the court erred in refusing to charge the jury that the law presumed the defendant ceased to cohabit with his wives when the law took effect. The court did charge that the law presumed the defendant innocent till proved guilty beyond reasonable doubt,—innocent both before and after the law was in force,—before and at the time of the offense charged. If a lawful relationship is formed, and its continuance is made unlawful, the law presumes the parties thereto intend to obey the law, and that they terminate or change the relationship so as to make it conform to an innocent intent. In such a case it is necessary that the lawful intent should be changed to an unlawful one, or that the relation should be changed to a lawful one; that is to say, made to conform to the law. The law presumes change of conduct, rather than change of a lawful intent to an unlawful one. But if the relationship was unlawful in its inception, and the intention was unlawful, then it would be necessary to presume a change of both intention and relationship. If the relationship was unlawful in the beginning, and the intent was also, and the name of the offense is simply changed, or punishment is simply imposed on that which was unlawful before, the presumption remains the same as though no change had been made in the law. In either case the law presumes innocence till guilt is proven. A disposition and intention to violate the law in entering into the relationship with these women being shown, it affords an inference of some effect upon the man, when considered with the other evidence, at the time of the offense charged. The inference against the defendant from his marriage to these women before the law went into force, with the inferences from his own conduct towards them, and the circumstances, within the time limited in the indictment, strengthens the latter. In determining how this man lived between the dates named, the public would take into view his inclination and disposition to cohabit with the women, as shown by his conduct and example before the law took effect, and in that way contributes to the example which injures society. The common law has been in force

in this territory more than a generation; and an act of congress against bigamy more than 22 years. None of the conduct or circumstances in evidence extend back so far. They tended to prove a relationship unlawful in its inception. We are of the opinion that there was no error in admitting evidence for the purpose of showing marriage between the defendant and the women named, before the law took effect, or showing that he cohabited with them as his wives before that time. *Thayer v. Thayer*, 101 Mass. 111.

Exceptions were also taken to the charge of the court to the jury, and to the refusal of requests to charge by the defendant. The entire charge of the court, as given to the jury, is set out in the bill of exceptions. It contains a description of the offense, and the plea of the defendant, and charges them that the law presumes the defendant innocent till proven guilty beyond a reasonable doubt; that if the jury believe beyond a reasonable doubt that at the county, and between the dates mentioned in the indictment, the defendant lived with the women therein named, or with any two of them, as his wives, in the habit and repute of marriage, they should find him guilty; that it was not essential that sexual intercourse should be shown or a marriage celebrated; that the jury were the sole judges of the credibility of the witnesses,—of the weight of the evidence of the fact; that in judging of their credibility the jury might take into consideration the deportment of the witnesses on the stand, their apparent frankness and candor, or the want thereof, appearing from the evidence,—the reasonableness of their statements, and any fact appearing in evidence affecting their credibility; that in weighing the evidence the jury should consider it altogether, and should consider only evidence; that they should not go outside of it; that they should consider it fairly and candidly, and reach such reasonable conclusions as they might be able. The jury found the defendant guilty as charged.

The prosecution asked no instructions, and the defendant asked 25,—all of which were refused, except so far as their principles were contained in the charge given.

In the case of *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, the court said:

"It is the settled law in this court that if the charge given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to instruct further. It may use its own language, and present the case in its own way."

The charge of the trial court in this case covers the entire case, and is plain. In the case last cited the court also said: "When instructions are asked in the aggregate, as were those of the defendant, and there is anything exceptionable in either of them, the whole may be properly rejected by the court." That there were many things exceptionable in the 25 asked, in the case under consideration, is certain. The instructions asked and refused, so far as we deem it necessary to refer to them, may be classified as follows: *First*. Those

stating abstract principles of law. In the refusal of these there can be no error. *Second.* Such as attempted to define the degree of intimacy necessary to be shown between defendant and the women named. In its charge to the jury the court gave a definition of unlawful cohabitation, and in doing so defined the necessary intimacy. *Third.* Those relating to the presumption of innocence arising when the law under which defendant was prosecuted took effect. The question raised by the exception was discussed above, and we are of the opinion that the exception is not well taken. *Fourth.* Those declaring principles of law included in the charge. The court stated such principles in its own language in the charge, and that was sufficient.

The precise questions raised by the exceptions to the ruling of the court below in this case, in refusing to sustain objections to the indictment, were considered in the case of *U. S. v. Cannon*, ante, 369, and decided at the present term. We are satisfied with the conclusions reached in that case, and hold that the trial court committed no error in overruling such objections. Without directing attention further to the exceptions taken by defendant, and after a careful consideration of the whole case, we are of the opinion they are not well taken, and that the judgment of the court below should be affirmed. It is so ordered.

BOREMAN, J., concurs.

POWERS, J., concurs in that portion of the opinion construing the Edmunds act, but dissents from the conclusion of the court affirming the judgment of the court below, and files his reasons therefor.

POWERS, J., *dissenting.* This case was argued at the same time as the case of *U. S. v. Cannon*, and many of the objections that are here raised were discussed in the latter case, and are considered and determined in the opinions filed. It is therefore unnecessary to refer to the question raised as to the proper construction of the Edmunds act, so called. There are, however, some features entirely different and distinct, raised by the record in this case, from those that were raised and decided in the *Cannon Case*; and while my brethren are of the opinion that there is no error shown in the record, I am so clearly of the opposite opinion, and so well convinced that a new trial should be ordered, that I dissent from the opinion of the court, and present herewith my views:

1. The first point that is raised by the defendant is that there was not sufficient evidence to justify the verdict of the jury for the offense as defined by the court. While a careful reading of the record discloses that the testimony was somewhat weak, still I am not prepared to say that the case should have been taken from the jury; and, indeed, in the view that I take of the case, and with the manifest er-

rors that the record discloses, it is not necessary that I should determine that question. I may, however, in passing, refer to one matter. It is contended by the defendant that his entire conduct towards the women designated as his wives, as shown in the testimony, was not only proper, but commendable. It is argued that as he had previously had children by these women, and that these children had been legitimated by the very act which makes it a misdemeanor for a male person to cohabit with two or more women, that the defendant was under a moral obligation, if not legally compelled so to do, to support his children and their mothers. That he therefore had a right to live with them under the same roof, to eat with them at the same table, to confer with them, and to converse with them; to call them by his name, and to treat them in as friendly a manner as he chose, so long as he refrained from sexual intercourse with the women.

The defendant claims that there is no law that requires him to divorce himself from the women. That is true, but the effect of the Edmunds act is to require him to treat these women substantially as he would be required to treat them if he had been divorced from them by a court of competent jurisdiction. In my opinion a man who has heretofore contracted a polygamous marriage, and has had children by two or more women, is required, as I have stated, to treat those women precisely as he would be required to treat them if he had been divorced from them. A man divorced from a woman is under legal obligations to support his children. He may be required by the decree of the court to support his wife, and to pay to her stated sums at stated intervals; but, with the exception of the business relation which exists between him and his former wife, it is not expected that he will have any further intimacy with her. He may visit his children, he may make directions with regard to their welfare, he may meet his former wife on terms of social equality; but it is not expected, after the decree of divorce, that he will associate with his former wife as a husband associates with his wife; that he will live under the same roof, and, to outward appearances, live with her as a husband lives with his wife. The Edmunds law says that there must be an end, and it puts an end, to the relationship previously existing between polygamists, whatever it was. It says that that relationship must cease.

2. On the trial of this case, Bishop Warburton, of the Mormon church, and Charles Brown, were sworn as witnesses for the prosecution. Brown is the ward clerk, and he testified that there is a record-book kept in his ward—which is in the same ward in which Musser lived—of the births, baptisms, and blessings of children. He stated that as clerk of the ward it is a part of his duties to keep such book, and he is its custodian. From his testimony it appeared that about six months previous to the trial the book mysteriously disappeared. The witness stated that he did not know where it was; that he had made efforts to find it; and that he had been unable to find it. He

stated that the book contains, in addition to the record of baptisms, the names of the child and its parents. Bishop Warburton testified that he did not know where the book was, or by whom it had been taken, and stated that he never had blessed any of defendant's children. The question was put to Brown, after he had testified that the book had been taken from his custody, as follows: "By whom was it taken?" and defendant objected on the ground that the testimony was immaterial. The court overruled the objection and the defendant excepted, and the witness testified that he did not know. The defendant also objected, on the ground that the testimony was immaterial and irrelevant, to the testimony of Bishop Warburton as to his administering blessings to children, and an exception was taken to the admission of the testimony.

This testimony was all clearly immaterial and irrelevant, and should have been stricken out by the court, and the jury instructed not to consider it. True, there is very little in it that may be said to directly injure the defendant, but in its very immateriality the danger lies. It tended to distract the attention of the jury from the real issue, and would have a natural tendency, by leading their minds from the question as to whether the defendant was guilty of cohabitation, to consider the peculiarities of the Mormon church organization. There was also danger that the jury might infer that the defendant was in some way connected with the loss of the book inquired after, when there was no proof on that point. But as the record discloses that the defendant did not see fit to avail himself of his right to move to strike out the testimony, and did not object to many portions of it that were clearly inadmissible, it therefore is not necessary to further consider this testimony at this point, and it is only mentioned at this time on account of the bearing that it will be seen to have on this case, when we come to consider some further developments in it, and also the charge of the court, and the requests for instructions that were presented by the defendant.

3. The next point that is made by the defendant is of more importance. After the evidence had been closed, the assistant district attorney, in making the closing argument for the prosecution, stated to the jury, in substance, that it was within the power of the defendant to show all the facts in his defense by his wives and children, but that it was not in the power of the prosecution to show the facts by them, because they had been put out of the way by the procurement of the defendant. One of the counsel for the defendant objected to this line of argument, and the court thereupon remarked: "I suppose there is no evidence as to how they were put out of the way." All the testimony taken in this case before the jury is brought up by the record, and it discloses, not only that there was no evidence that the persons referred to had not been put out of the way by the procurement of the defendant, or by anybody else, and the court was therefore in error when it said, "I suppose there is no evidence as to

how they were put out of the way," because that remark could not have failed to convince the jury that it was clearly the opinion of the court that the persons referred to had been put out of the way somehow, and, instead of curing the error caused by the remarks of the district attorney outside of the record, it added additional error, and gives additional ground to the defendant upon which to base his claim for a new trial. A judge has no right to express his opinions upon the facts of the case in the hearing of the jury, in a manner that will have a tendency to affect their verdict. The rule is laid down in many well-considered cases that it is not proper for the judge to make remarks in the hearing of the jury, calculated to influence their finding. *Skelly v. Boland*, 78 Ill. 438; *Furham v. Huntsville*, 54 Ala. 263; *Wannack v. Mayer*, 53 Ga. 162; *Hasbrouck v. Milwaukee*, 21 Wis. 217; *Cronkhite v. Dickerson*, 51 Mich. 177; S. C. 16 N. W. Rep. 371.

It appears by the record that after the judge had made the remark that I have quoted, that the district attorney made no further comment on that subject. It also appears that at another part of his argument he stated to the jury that during the trial of the case an outsider had come into the court-room and made signals with his fingers, as a means of telegraphing to the jury. The defendant's counsel interrupted him, and called him to order, upon which the court said, "That can be attended to afterwards;" and thereupon the district attorney ceased to comment upon it. The prosecution contends that the remarks referred to were made in the heat of argument, without any thought of traveling outside the record, and with no purpose or intent to mislead the jury in their consideration of the case. The prosecution submits that the improprieties complained of were inadvertent; that they were not the result of mature deliberation; and that they were not continued,—all of which I am glad to concede; but the fact that the remarks were inadvertently made would not remove their natural effect upon the jury. The prosecuting officer, representing and standing for the government, by reason of the very position that he occupies, has more weight and influence with the jury than private counsel. He is supposed to have no more interest in the case than that justice may be done between the government and the prisoner at the bar. He is supposed to be impartial in his investigation of crime, and in his efforts to suppress it. Upon the one hand, he is not to let any guilty man escape; upon the other hand, he is not to allow any innocent man to be convicted. On this account, his words to the jury being presumed by the law, and by the people, for that matter, to emanate from an unprejudiced and unbiased mind, his statements have infinitely more weight, and his remarks should, therefore, be more guarded, than those of an attorney who appears in behalf of the defendant.

A prosecuting attorney is not a plaintiff's attorney, but a sworn minister of justice; as much bound to protect the innocent as to pursue the guilty.—26

sue the guilty. *Wellar v. People*, 30 Mich. 23. His position is one involving a duty of impartiality, not altogether unlike that of the judge himself. The position is a trying one, but the duty, however, exists. *Meister v. People*, 31 Mich. 104. He represents the public interests, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simple justice, and he has no right to sacrifice these to any pride of professional success; and, however strong may be his belief in the prisoner's guilt, he must remember that though unfair means may happen to result in doing justice to the prisoner in the particular case, yet justice so attained is unjust and dangerous to the whole community. *Hurd v. People*, 25 Mich. 416. That the remarks of the assistant district attorney were calculated to work injury to defendant, and were error, I do not think can be successfully denied. But it is argued that no exception was taken at any time; that there was nothing to except to; that the court was asked to interfere and did so; and that thus the application of the defendant was granted, and that the matter has no place in the record and cannot be considered by the court. It would seem to be too clear for argument that the matter is subject to review by the supreme court. The supreme court has supervisory jurisdiction over the district courts, and whenever it appears that a defendant has not had a fair trial, or that the trial has not been conducted in accordance with the settled rules of law, this court has the power to review the proceedings and to order a new trial. There are many cases in the books in which it has been held that points similar to the one under consideration would be considered by an appellate court. See *Scripps v. Reilly*, 35 Mich. 391, and cases there cited. It has been many times ruled that counsel, in argument, must not seek to influence the jurors by reference to the matters in the nature of evidence, not in proof before them, and that the trial judge should promptly repress the attempt as something reprehensible. *Bullock v. Smith*, 15 Ga. 395; *Scripps v. Reilly*, 35 Mich. 391; *Berry v. State*, 10 Ga. 511; *Mitchum v. State*, 11 Ga. 615; *Dickerson v. Burke*, 25 Ga. 225; *Read v. State*, 2 Ind. 438; *Tucker v. Henniker*, 41 N. H. 317; *Kennedy v. People*, 40 Ill. 488; *Hatch v. State*, 8 Tex. Ct. App. 417; *Austin v. People*, 102 Ill. 264; *Fox v. People*, 95 Ill. 78; *Angelo v. People*, 96 Ill. 213; *Conn v. State*, 11 Tex. Ct. App. 400; *Laubach v. State*, 12 Tex. Ct. App. 590; *State v. Kring*, 2 Amer. Crim. Rep. 314; *State v. Smith*, 1 Amer. Crim. Rep. 581; *Ferguson v. State*, Id. 582; *State v. Graham*, 17 N. W. Rep. 192.

It has been held that where counsel have traveled outside of the record in addressing the jury, that the error was not cured even by an instruction to the jury not to consider the matter. *Morton v. Orndorf*, 22 Iowa, 504; *State v. Whit*, 5 Jones, Law, (N. C.) 224.

It is the chief duty of the trial judge to secure fair play to litigants, and, so far as practicable, to shape the order and course of the proceedings in such a way that neither party will be put to a disadvan-

tage not due to his case or its mode of management by his counsel. The rules of the court, and what is called the course of the court, have their origin in the purpose to secure fairness in legal controversies, and the order of business and the regulated succession of steps at trials have the same object. The courts have usually been very firm in confining counsel within proper bounds, and guarding jurors against unfair and irregular acts and endeavors, and parties have been deprived of their verdicts upon evidence merely indicating the operation of influences about the outskirts of the trial. *Scripps v. Reilly*, 35 Mich. 390.

It was stated in *Tucker v. Henniker*, 41 N. H. 322, that it would be utterly vain and quite useless to caution jurors, in the progress of a trial, against listening to conversations out of the court-room in regard to the merits of the case, if they are permitted to listen in the jury-box to statements of fact not in evidence, calculated to have a bearing upon their judgment, enforced and illustrated by all the eloquence and ability of learned, zealous, and interested counsel. Considering, in connection with the remarks of the prosecuting attorney complained of, the fact of the weakness of the testimony, the immaterial evidence received from the witnesses Brown and Warburton, and the remarks of the court upon the objection made to the line of argument of the district attorney, I am forced to the opinion, without going any further, that there is error in the record, and that a new trial should be granted without any hesitation. It may be that this defendant should be convicted; but the fact that he should be convicted, if such is the fact, does not deprive him of his right to a fair trial according to the law and the evidence.

4. The trial having taken the course that I have indicated, it became the duty of the court, when it came to charge the jury, to very carefully guard the rights of the defendant, and to clearly draw the attention of the jury to the real issue in the case, and inform them that outside matters, and irrelevant testimony, should not be considered by them. The testimony proper for their consideration should have been pointed out; and the matters and the testimony that the jury ought not to consider, should also have been called to their attention; but the charge of the court fails to do this. The attempt made to cure the errors that I have indicated was not sufficient. Each and every instruction requested by the defendant is refused; many of them being clearly proper, some being calculated in a slight degree to cause the jury to disregard the matters that had been improperly brought to their attention. The charge simply states the offense; tells the jury that it is brought under a section of the statute of the United States which is read to them; that the defendant is presumed innocent until proven guilty beyond a reasonable doubt, and that if the jury believe from the evidence, beyond a reasonable doubt, that the defendant, between the dates named in the indictment, lived with the women named therein, or with any two of them, as his wives, in the

habit and repute of marriage, they should find him guilty; that they need not find that he lived with any one of them, or any two of them, all the time, but he must live with them a portion of the time within the dates charged; that it is not necessary to the offense that the defendant should occupy the same bed with the women, or have sexual intercourse with them; neither is it required that a marriage should be celebrated between any of them and the defendant. The jury were told that they must consider the evidence altogether, and not go outside of it. They were told that they were the sole judges of the credibility of the witnesses and the weight of the evidence; that they must consider it altogether, not giving undue weight to any portion of it; and in conclusion they were told that a reasonable doubt is a doubt based upon reason,—based on the evidence or the lack of evidence.

Nothing was directly said to the jury with reference to the remarks of the district attorney, or with regard to immaterial evidence introduced in the case. The testimony had a very wide range, extending back for many years prior to the passage of the Edmunds act, and the defendant requested the judge to charge the jury that—

“The law distinguishes between the continuing of the *status* of a polygamous marriage and cohabitation between the parties. The former is not unlawful, and its continuance affords no ground for inference of the fact of cohabitation. It is not necessary that the parties to a polygamous marriage should divorce themselves in some effectual way, in order to entitle themselves to the presumption of innocence of the offense of cohabitation.”

There can be no question but that this instruction is proper, and should have been given, and its refusal was error. That it was proper, is readily seen by an examination of the case of *Murphy v. Ramsey*, 114 U. S. 15; S. C. 5 Sup. Ct. Rep. 747. The defendant also asked the court to instruct the jury that—

“There is no duty on the defendant to produce in court his children, or the women mentioned in the indictment; nor is there any evidence that the defendant has had any agency in keeping them away, or in preventing the service of subpoena on them; and the jury are not authorized to draw any inference against the defendant from their absence.”

This request is proper, and should have been given. The only reason that I can conceive for its refusal, and the failure of the court to say anything upon this subject in his charge, after the matters had arisen upon the trial, and in the course of the argument to which I have referred, is that the judge must have believed that the jury were entitled to draw an inference against the defendant on account of the absence of those parties. After the court had given this charge, one of the counsel for defendant called the attention of the judge to the fact that it had been argued to the jury that there is no presumption of law that, on the passage of the Edmunds act, those who had lived in polygamy before, ceased to do so; and the defendant's counsel called the attention of the court to the fact that at the time of the argument the court did not correct the prosecuting attorney, and requested a charge upon this point, to which the court replied: “I did not wish

to charge upon that point; I have charged the jury that the law presumes the defendant innocent."

The instruction requested by the defendant's counsel should have been given, and in not giving it the court virtually allowed the jury to believe that there is no presumption of law that, at the passage of the Edmunds act, those who had lived in polygamy before, ceased to do so. In my opinion such is the presumption of law. The court was also requested to instruct the jury that evidence of anything that transpired between the parties,—the defendant and his alleged wives,—or their relationship between each other, prior to the date named in the indictment, is immaterial, except for the purpose of illustrating their conduct afterwards. The request should have been given; and so ought the jury to have been instructed, as requested by the defendant, that—

"Evidence has been introduced tending to show the keeping of a record of baptisms and blessings, by the clerk of the ward in which the defendant lived. That evidence could only be material for the purpose of showing that the defendant had nominated some of his children for either of those rites, and if the jury find that this defendant did not have the names of any of his children entered in that book, then that entire testimony becomes immaterial."

I have already called attention, in the opinion filed in the *Cannon Case*, to the various requests for instructions which were made in that case and refused by the court. The same requests were made in this case and refused by the court. The refusal was error. The error is more apparent in this case, the testimony being less substantial than that of the case of *U. S. v. Cannon*.

For the errors that I have pointed out, as well as on account of many others apparent upon the record, I dissent from the opinion of the majority of this court, and I believe that the defendant, Musser, should have a new trial granted him, because the record discloses that the trial which resulted in his conviction was not a fair trial.

(4 Utah, 107)

DOOLEY v. STRINGHAM.

Filed June 18, 1885.

1. PRACTICE—WASTE—INJUNCTION TO STAY—DISPUTED TITLE.

Injunction is the proper remedy to stay waste, even when title is in dispute.

2. STATUTE—CONSTRUCTION OF.

Sections 666, 676, and 678 of the Compiled Laws should be construed together, and made to stand, if possible.

Hall & Marshall, for respondent.

Z. Snow, for appellant.

BOREMAN, J. In 1871 Bryant Stringham died, owning a homestead consisting of two lots of ground, in Salt Lake City, and leaving a widow, Susan A. Stringham, the appellant, and eight children. Some of the children are still minors, living with their mother. The widow and children were residing on the homestead at the death of

decedent, and she still so resides. In 1879 the probate court set off the homestead to the widow for life, and to her said children in fee. In 1883 four of the adult children sold and conveyed to respondent all their interests, consisting of the undivided half of said homestead, in reversion. In 1884 the appellant began tearing down an adobe dwelling-house situate on the homestead, with the professed object of replacing the same with a better building, and alleging the adobe dwelling as unfit for use. The respondent sued out an injunction to restrain the widow from destroying the house then upon the lots. At the time of answering, the appellant filed a cross-complaint, alleging that respondent had no title or interest, and that his claim was a cloud upon her title, and she prayed that respondent might be enjoined from claiming any interest or title to said property, and she filed her motion also to dissolve the injunction granted in favor of respondent.

To the cross-complaint the respondent demurred, alleging as ground of demurrer that the cross-complaint did not state facts sufficient to constitute a cause of action. Upon the hearing of the motion and demurrer, the court overruled the motion to dissolve the injunction, and sustained the demurrer to the cross-complaint. From the order refusing to dissolve the injunction, and from the order sustaining the demurrer to the cross-complaint, the appellant has brought the case to this court. The appellant claims the absolute fee-simple title to the lots, and that if she be not entitled to that, but only has a life-estate, yet that she has the right to tear down the building.

At the time of the death of Bryant Stringham, the statutes incorporated into the "Compiled Laws" as bracket sections (666) and (676) were in force. The first of these sections reads as follows:

"(666) Sec. 14. When the deceased leaves a wife or family, no property exempt by law from execution shall be considered assets, or administered upon, but shall be held for the exclusive benefit of the wife or family, and shall not be liable for any debts against the estate."

And the other section reads as follows:

"(676) Sec. 24. The homestead occupied by the wife, or any portion of the family of the deceased, at the time of his death, shall in all cases be held free to the use of the wife and family of the deceased, and shall not be liable to any claim or claims against said estate; and if there be other property remaining after the liabilities of the estate are liquidated, then it shall, in the absence of other arrangements by will, descend in equal shares to his children or their heirs,—one share to such heirs through the mother of such children, if she shall survive him, during her natural life, or during her widowhood; or if he has had more than one wife, who either died or survived in lawful wedlock, it shall be equally divided between the living and the heirs of those who are dead, such heirs taking by right of representation."

If the two sections were held to be in conflict, the latter would take precedence, as it is specific, and the prior one is general in character. But we are unable to see wherein there is any conflict, so far as the question in dispute is concerned. The prior of the two sections, if strictly construed, would probably be held to mean that when a man

dies leaving a wife and no children, the exempt property should go to the wife absolutely; and if he dies leaving no wife, yet leaves a family, the exempt property should go to them absolutely; and that it made no provision for the case of a man leaving both wife and children. Yet we are not inclined to this strict construction, but think a more favorable view should be taken of the section. The whole of the act of March 3, 1852, from which these two sections were taken, is crude and indefinite. In another section of the same act (and now found in the "Compiled Laws," bracket section 678) it is provided that "in all cases where the deceased leaves a wife, the inheritance shall not pass therefrom so long as the name of the dead shall be perpetuated thereon." This section, if it means anything, provides that the wife shall be allowed to retain some "inheritance" as long as she remains a widow; and the word "inheritance," in this connection, would apply more appropriately to the homestead than to anything else. The appellant is a widow, and hence, under these sections (666) and (678,) has a present estate and interest in the lots, if section (666) be held to apply to real estate. Sections (666,) (676,) and (678) should be construed together and be made to stand, if possible. There seems to be no way to enable them to stand together except by this liberal construction we put upon them, and, thus construing section (666) with reference to the others, it is evident that the legislature did not intend in that section (666) to leave unprovided for, the case of a man at death leaving both a wife and family, but that the property was for the benefit of both wife and family. And the same might be held accordingly, unless some other section provided otherwise in regard to some particular part of the exempt property.

Another section, (676,) does make provision for the disposition of so much of the exempt property as is embraced under the head of homestead. Then the only remaining exempt property is personal property, and it follows that section (666) applies only to personal property, and section (676) applies to real estate. By this construction all of these sections stand, and do so without any forced construction of the language, and section (676) alone controls the disposition of the homestead. This last section provides that the homestead (it is exempt from execution) shall not be liable for the debts of the deceased, but shall be held for the use of the wife and family of the deceased. So long as his family should exist as a family, the homestead was to remain as a homestead. When his family should cease to exist as such, no provision is made for a longer continuance of the homestead, and it would naturally pass, as other property, to the heirs of the deceased upon the death of the widow, and when the children had reached their majority and scattered off, making homes for themselves. The latter part of section (676) has no bearing upon the question at issue, as it provides for the disposition of "other property" than the exempted property. Nor does the fact that the government title had not been obtained at the death of the decedent, become mate-

rial in this case, as the statutes applied to possessory rights as well as to title in fee.

The widow having had a life-estate set off to her, and being in possession of the homestead, with reversion in the heirs, the question arises, had she the right to tear down the dwelling-house? She had no right to commit waste. Waste is substantial damage to the reversion, done by one having an estate of freehold or for years, during the continuance of the estate. Ad. Eq. side page, 208. The affidavits show the building to be of value. Its destruction would, therefore, be "substantial damage" to the reversion. Whether appellant would ever replace it with a better or as good a building, or by any building, is beyond our province to inquire. It might become an impossibility, no matter how willing appellant might be. Is injunction the proper remedy? It is no unusual exercise of the writ to enjoin waste, and is a proper remedy. 1 High, Inj. §§ 649, 655; 2 Pom. Eq. §§ 917, 919; 3 Pom. Eq. § 1348.

It is a proper remedy even when title is in dispute. *Erhardt v. Boaro*, Sup. Ct. U. S. 5 Sup. Ct. Rep. 560.

Let both orders of the court below be affirmed.

ZANE, C. J., and POWERS, J., concur.

(4 Utah, 67)

VENARD, impleaded, etc., v. OLD HICKORY M. & S. Co. and others.

Filed June 18, 1885.

PRACTICE—REHEARING—WHAT WILL JUSTIFY IT.

To justify a rehearing, a strong case must be made, whereby it appears, either that the court failed to consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time.

U. J. Wenner, for intervenors.

P. Denny, for appellant.

POWERS, J. The intervenors, Austin and Greene, move this court for a rehearing, for the reason, as claimed, that the court did not give mature consideration to certain points involved. At the time the case was argued, only one of the three members of the court, as now constituted, was then upon the bench. The case was argued at the January term, and the opinion was filed March 21, 1885. There is nothing in the petition for rehearing that convinces us that the court did not fully consider all the questions in the case. On the contrary, an examination of the opinion, which was prepared by EMERSON, J., discloses that the court actually considered the very matters which we are now asked to review. Such being the case, this court will not presume that due consideration was not given. Moreover, the petition for rehearing fails to convince us that this court has committed any error. To justify a rehearing, a strong case must be made. We must be convinced, either that the court failed to duly consider some

material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time. In this case, the showing made is not sufficient to justify us in rehearing the cause. The application must be denied.

ZANE, C. J., and BOREMAN, J., concur.

(4 Utah, 116)

FENTON v. SALT LAKE Co., impleaded, etc.

Filed June 20, 1885.

APPEAL—JUDGMENT ON MERITS AFTER APPARENT—DECISION BY SUPREME COURT.

A defendant is not precluded from seeking in the supreme court the reversal of a judgment upon the merits by the fact that the decision upon a demurrer in the same case previously decided against him by the supreme court seemed to render the judgment appealed from essential.

Motion to dismiss appeal.

J. D. Lomax, for plaintiff.

L. Snow, for defendant.

POWERS, J. This matter comes up on a motion to dismiss the appeal. The plaintiff filed his complaint in the court below, to which the defendant demurred. The demurrer was overruled by the lower court, whereupon the defendant appealed from the order overruling the demurrer, to this court, which reversed the order of the lower court, and directed that court to sustain the demurrer, which was done. The plaintiff elected to stand upon his complaint, and thereupon the lower court dismissed the case, from which judgment the plaintiff now appeals, and the defendant moves to dismiss the appeal, on the ground that the lower court merely carried out the instructions of this court; that there is nothing presented by the present appeal that was not passed upon when the case was here before. The statute gives the plaintiff the right to appeal to this court. Laws 1884, § 828. Whether there is any merit in his appeal cannot be considered on this motion. *Michigan Ins. Co. v. Whittemore*, 12 Mich. 311; *Tower v. Detroit & M. R. Co.* 7 Mich. 10. Neither can we consider whether a principle before decided is applicable to the case on its merits. We are of the opinion, therefore, that this motion must be denied.

ZANE, C. J., concurs. BOREMAN, J., did not sit in this case.

(4 Utah, 231)

PEOPLE v. ROGERSON.

Filed June 27, 1885.

MOTION FOR A REHEARING—MISAPPREHENSION OF LAW—MOTION DENIED.

On rehearing. See S. C., *ante*, 255.*W. H. Dickson*, for the People.*P. Denny*, for respondent.

POWERS, J. This is an application for a rehearing, the reason alleged being that this court, in deciding the case, misapprehended the law. The case was carefully considered, in all its bearings, by this court, on the hearing, and it appears by the opinion on file that all the points raised by the defendant were considered. We are not convinced that a rehearing should be granted, and a rehearing is therefore denied.

ZANE, C. J., and BOREMAN, J., concur.

SUPREME COURT OF CALIFORNIA.

(67 Cal. 122)

HATCH v. NEW ZEALAND INS. CO. (No. 8,576.)

Filed June 22, 1885.

FIRE INSURANCE—DESCRIPTION OF PROPERTY IN POLICY.

Where a policy of fire insurance describes the property insured, and adds that it is "Warehouse No. 2," when in reality the property insured was "Warehouse No. 1," such part of the description as is false may be rejected, if the remaining description sufficiently identifies the property.

Department 2. Appeal from the superior court of the city and county of San Francisco.

W. S. Goodfellow, for appellant.

J. R. Brandon, for respondent.

THORNTON, J. The defendant insured the property of the plaintiff in the Overland Free Warehouse, situate at the north-east corner of Third and King streets, San Francisco. It makes no difference that this building was styled in the policy Overland Free Warehouse No. 1. As it was actually Overland Free Warehouse No. 2, instead of No. 1, the part of the description No. 1 in the policy should be rejected as false. No. 2 was the warehouse at the corner, while No. 1 was 46 feet distant from it. If the property intended to be conveyed is described in a deed as Overland Free Warehouse No. 1, situate on the north-east corner of Third and King streets, San Francisco, upon proof that a warehouse of that name was situate at the north-east corner of the streets named, such warehouse would be held to pass to the grantee, though described as No. 1, when it was really No. 2. It appearing by the proof of the actual condition of the property that the description No. 1 was false, and that the remaining description of the property sufficiently identified it, the false part should be rejected. We know no reason why this rule does not apply to a description of property in a policy of insurance, as well as to a description of property in a conveyance. The findings sufficiently identify the warehouse in which the property insured was stored.

There is no error, and the judgment and order are affirmed. Ordered accordingly.

We concur: SHARPSTEIN, J.; MYRICK, J.

(67 Cal. 152)

HENDERSON v. NICHOLAS and others. (No. 8,447.)

Filed June 23, 1885.

RIPARIAN RIGHTS—APPROPRIATION AND CONVEYANCE OF.

Where water-right by appropriation is acquired by several owners, one of them can only convey his own interest therein, and cannot convey so as to affect the interests of his co-owners.

Department 2. Appeal from the superior court of Calaveras county.

J. B. Lamar, for appellants.

W. T. Lewis and *W. K. Boucher*, for respondent.

THORNTON, J. As early as 1858, plaintiff and his brother, J. M. Henderson, appropriated and used the water in controversy in this cause, and plaintiff has continued to use one-half of it ever since, until prevented by the acts of the defendants. The conveyance of J. M. Henderson to Latori and others, of the interest described in it, which was afterwards transferred to defendant George Nicholas, at most only conveyed his interest in the water-right, and did not affect the interest of plaintiff. One partner can convey only his interest. We know of no rule of law by which he could convey more. The right which defendant George Nicholas acquired from the United States was subject to the water-right of plaintiff. Rev. St. U. S. §§ 2339, 2340.

The judgment, however, herein should more definitely describe the interest of the plaintiff designed to be protected by it. The last clause in the judgment should be modified so as to read as follows:

"It is further ordered, adjudged, and decreed that the plaintiff is the owner by prior appropriation of, and entitled to use one-half of, the waters of McKenney's creek, to the extent of the capacity of the ditch described in the complaint herein, which capacity is one hundred and twenty-five inches, for irrigating his garden and other useful purposes; but plaintiff's right herein adjudged does not exceed one-half of the capacity of said ditch. And it is further adjudged that he is entitled to the use of said ditch for the flow of the waters hereby decreed to him. And it is further ordered and adjudged that the defendants herein, their agents, employees, and servants, are hereby perpetually enjoined and restrained from interfering in any way with plaintiff's rights to said water, and the use of the ditch hereby decreed to him."

The portion of the decree as to costs and damages is correct, and will remain unchanged. We find no other error in the record. The cause is remanded to the court below, with a direction to modify the decree in the manner above pointed out. Ordered accordingly.

We concur: SHARPSTEIN, J.; MYRICK, J.

(67 Cal. 143)

DAVIDSON and others v. KNOX and others. (No. 8,621.)

Filed June 23, 1885.

1. ACTIONS AGAINST PARTNERSHIP—SERVICE OF PROCESS—JUDGMENTS.

Where, in an action against a partnership on a joint liability, the complaint and summons designate the defendants individually, with a description that they are partners, doing business under a firm name, the judgment can only be against the parties served, and not against a defendant not served with summons or who does not appear, though he be a member of the partnership. Code Civil Proc. Cal. § 414.

2. ACTION AGAINST ASSOCIATION—JUDGMENT IN.

In an action under section 388, Code Civil Proc. Cal., authorizing suit against an association under its common name, whether it comprise the names of all the members or not, the summons in such case to be served on one or more of the associates, and providing that the judgment in such action shall bind the joint property of all the associates, as if all had been served, no judgment is authorized against the defendants not served, if the action was brought against certain defendants named, with a description that they were members of such association, but not against the association itself under its common name.

Department 2. Appeal from the superior court of the county of Calaveras.

Carter P. Pomeroy and Ira H. Reed, for appellants, S. P. and P. V. R. Ely.

Scrivener & Boone, for the other appellants.

W. K. Boucher, for respondents.

THORNTON, J. In the caption of the complaint in this action the defendants are thus named and described: "Richard F. Knox, Joseph Osborne, Samuel P. Ely, W. T. Robinson, and Philip V. R. Ely, copartners, doing business under the firm name of Knox & Osborne." The averment in the complaint as to the relations of defendants to each other is as follows:

"That the said defendants, Richard F. Knox, Joseph Osborne, Samuel P. Ely, W. T. Robinson, and Philip V. R. Ely, now are, and during all the times mentioned in said complaint have been, partners and associates, doing business under the firm name of Knox & Osborne, and, as such partners and associates, owning, working, and operating a certain quartz mine and quartz mill, situate near the village of Mokelumne Hill, in said county and state; the said mine being named the 'Esperance Quartz Mine,' and the said mill being known as the 'Knox & Osborne Quartz Mill.'"

The complaint asks for judgment against "said defendants."

The caption of the summons as regards defendants is in the same words as the caption of the complaint above quoted. In the summons these words are used as to the defendants to whom it is directed, and who are required to appear and answer:

"The people of the state of California send greeting to Richard F. Knox, Joseph Osborne, Samuel P. Ely, and W. T. Robinson, and Philip V. R. Ely, associates and partners, doing business under the firm name of Knox & Osborne."

As to the requirement to appear and answer, the language employed in the summons is: "You are hereby required to appear in an action brought against you, * * * and to answer. * * *"

The notification to the defendants in the summons is as follows:

"And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you for the whole of the principal sum and accrued interest thereon, as expressed in said notes and prayed for in their said complaint, and for costs of suit."

Service was made on Robinson, Knox, and Osborne only. Robinson made default, and Knox and Osborne answered. The cause was tried, and the court rendered judgment as follows:

"Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that the plaintiffs, the said M. Davidson and S. C. Peek, do have and recover of and from the said defendants, Richard F. Knox, Joseph Osborne, W. T. Robinson, Samuel P. Ely, and Philip V. R. Ely, partners and associates, doing business under the firm name of Knox & Osborne, the sum of five thousand and thirty-five 17-100 (\$5,035 17-100) in gold coin of the United States, with legal interest thereon from date until paid, together with the plaintiffs' costs and disbursements incurred in this action, amounting to the sum of seventy-two dollars, (\$72.)

"And it is further ordered and adjudged that the said plaintiffs do have execution against the separate property of the defendants Richard F. Knox, Joseph Osborne, and W. T. Robinson, or either of them, the parties served with process in this action, as well as against the joint property of all of said defendants, partners and associates as aforesaid."

This appeal is prosecuted by all the defendants, and they contend that the judgment is erroneous in that it is rendered against all the defendants, two of whom, the Elys, were not served with a direction that the plaintiff have execution against the separate property of the parties served, and the joint property of all the defendants. No such judgment is authorized by section 414 of the Code of Civil Procedure, which provides that when the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. The practice act formerly in force had a section somewhat similar to the section just above referred to. See Prac. Act, § 32. This section 32 in terms authorized such a judgment as was entered in this case. But no such provision is now found in the Code of Civil Procedure. It was probably omitted in consequence of what was said as to its constitutionality in the opinion of the court in *Tay v. Hawley*, 39 Cal. 93. But it is argued for the respondents (plaintiffs below) that the judgment is sustained by the provisions of section 388 of the Code of Civil Procedure. That section is as follows:

"When two or more persons, associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants, and had been sued upon their joint liability."

We think it sufficient to say that the action was not instituted under section 388. The clauses quoted above from the complaint and

summons show no intent to proceed under this section. Individuals, in the captions of both summons and complaint, are named as defendants, and are described as doing business as partners under a firm name. All the parties are named. This is also true of two of the clauses quoted above. The individuals are required to appear and answer; they are notified that if they do not appear judgment will be taken against them, and in the complaint judgment is asked against "said defendants." The same forms of expression as are herein employed, are those ordinarily used in actions against the individual members of a partnership on a partnership contract. Such being the case, we see no reason why we should construe the action to be one brought under section 388. In an action brought under this section it is not necessary to name all of the associates as defendants. In fact, the association, designated by its common name, is the only defendant, and the judgment authorized is one binding only the joint property of the association. It will thus be seen that the judgment here rendered is not in accordance with either sections 388 or 414 of the Code of Civil Procedure. Under the former, there can be no judgment against the separate property of any associate, and, under the latter, no judgment is allowed against the joint property at all.

We are of opinion that this is an action against the individual partners doing business under the firm name of Knox & Osborne on partnership contracts, and in such case, under section 414, Code Civil Procedure, the plaintiffs can only proceed against the parties served. The foregoing views dispose of the case, and render it unnecessary to pass on the constitutional question discussed by counsel. The plaintiffs are entitled to judgment against Robinson, Knox, and Osborne, who were served with process, but not against the Elys, who were not served. The judgment should then be modified by striking therefrom the names of the Elys, allowing it to stand as against the served parties.

The cause is remanded to the court below, with a direction to modify the judgment as above indicated.

Ordered accordingly.

We concur: SHARPSTEIN, J.; MYRICK, J.

MOKELUMNE & CAMPO SECO CANAL & MIN. CO. v. KNOX and others. (No. 8,622.)

Filed June 23, 1885.

Department 2. Appeal from the superior court of the county of Calaveras. The facts in this case were the same as those in *Davidson v. Knox*, (No. 8,621,) *ante*, 413. *Carter P. Pomeroy* and *Ira H. Reed*, for appellants, S. P. and P. V. R. Ely. *Scrivenner & Boone*, for the other appellants.

W. K. Boucher, for respondents.

BY THE COURT. This case is similar in all controverted points to that of *Davidson v. Knox*, No. 8,621, *ante*, 413, and on the authority of that case the cause is

remanded to the court below, with direction to modify the judgment by striking out the names of the Ely defendants, and allowing it to stand against Robinson, Knox, and Osborne. So ordered.

JUZIX v. CITY AND COUNTY OF SAN FRANCISCO. (No. 8,983.)

Filed June 23, 1885.

Department 1. Appeal from the superior court of the city and county of San Francisco. The facts in this case were similar to those in *Lehn v. San Francisco*, 4 PAC. REP. 965.

Wm. Craig, for appellant.

J. O. Bates, for respondent.

BY THE COURT. On authority of *Lehn v. City and County of San Francisco*, 4 PAC. REP. 965, and cases there cited, the judgment and order are affirmed.

SUPREME COURT OF CALIFORNIA.

(67 Cal. 156)

PEOPLE, etc., v. BARTLETT and others. (No. 11,044.)

Filed June 23, 1885.

SAN FRANCISCO—NEW CITY HALL COMMISSION—SPECIAL LEGISLATION.

The California act of March 24, 1876, establishing a new city hall commission, and providing for the construction and completion of the new city hall in San Francisco, is not open to the objection that it is an attempt by special legislation to deprive the supervisors of all discretion with respect to a local improvement, and is valid; and under it the new city hall commission continues until the amounts raised by taxation for the new city hall fund should be expended on contracts made by it, and under its direction, or that of the architect.

In Bank. Appeal from superior court of the city and county of San Francisco.

E. C. Marshall, Atty. Gen., and *Cary, Sullivan & Sullivan*, for appellants.

Jno. L. Love and *Jno. F. Swift*, for respondents.

BY THE COURT. 1. The act of March 24, 1876, "to provide for the completion of the building known as the 'New City Hall,'" St. 1875-76, p. 461, is not subject to the objection that it is an attempt, by special legislation, to deprive the supervisors of all discretion with respect to a local improvement. In *People v. Lynch*, 51 Cal. 33, it was held that the ultimate determination, which shall conclude the tax-payers of a city with reference to municipal improvement to be paid by them, must be that of the appropriate local legislature. The statute before us leaves with the local legislature the power of deciding whether the work upon the new city hall shall or shall not proceed as therein provided. The eleventh section of the act reads:

"In the event that the board of supervisors shall deem it expedient to continue the construction of the new city hall in the mode and manner prescribed in this act, they are hereby authorized and empowered to express such judgment, by resolution or order, in such form as they may deem proper."

The plain intention of the law is not to impose upon the supervisors the duty of levying any tax to be applied to the construction of the building, or to expenses connected therewith, unless they shall first "by resolution or order" determine to proceed under the act.

The complaint fails to allege that the board of supervisors did not "express their judgment" that it was expedient to continue the construction.

2. The complaint avers that the term of office of the city hall commissioners "under said pretended act of the legislature of March 24, 1876," expired on the eighteenth of January, 1883. In the points on file it is suggested that the office ceased to exist in July, 1881.

On the part of respondents it is claimed the commissioners must remain in office until the new city hall shall actually be completed. Section 17, p. 466. Appellants contend with much force that the

words in the seventeenth section, "erected or completed as in this act provided," require that the building shall be considered as completed, within the meaning of the law, when the moneys raised under its provisions are employed in the manner by the statute directed. Conceding the last to be the correct interpretation, the demurrer to the complaint was properly sustained. Under the eleventh section of the act of 1876, the supervisors were not empowered to levy or provide for the collection of any tax to complete said building after the expiration of the fiscal year 1880-81. Section 12 provides:

"The commissioners in each fiscal year may make contracts, and expend, in the construction of said building, a sum equal to the estimated receipts of the fund during the current fiscal year, but no larger or greater sum."

We do not understand it was the duty of the commissioners to make contracts or to expend (in anticipation) all the estimated receipts of the year, but that they were prohibited from contracting for the expenditure of more than such estimated receipts. Indeed the moneys actually collected for the new city hall fund in each of the four years for which the tax was levied may have been more than the estimate of the commissioners for each of the years. It seems clear that it was intended the new city hall commission should continue until the amounts raised by taxation for the new city hall fund should be expended under contracts made by the commissioners, and under their directions or that of the architect. The complaint does not show that there remain no moneys in the new city hall fund to be expended by the commissioners under the provisions of the act of 1876, or that there remains no work uncompleted which was regularly contracted for by the commissioners.

Judgment affirmed.

(67 Cal. 154)

DOYLE v. CALLAGHAN. (No. 8,799.)

Filed June 23, 1885.

CONVERSION—DECEIT—STATUTE OF LIMITATIONS.

Where the complaint in an action alleged the conversion of certain stock by defendants, who were bailees thereof, and that defendants thereafter induced the owner of the stock, by means of fraud, to release them from all claims and demands against them, and the owner subsequently assigned said stock, together with all claims and demands against the defendants "growing out of said fraudulent deceit," to plaintiff, who thereon demanded possession of the stock, which was refused, the cause of action thereon grew out of the conversion of the stock by defendants, and not out of the deceit or fraud by which the release was procured, and the running of the statute of limitations commenced from the date of the conversion.

Department 2. Appeal from the superior court of the city and county of San Francisco

Flournoy, Mhoon & Flournoy and Wal. J. Tusha and Thos. F. Barry, for appellant.

Lloyd & Wood, for respondent.

SHARPSTEIN, J. The allegations of the complaint are to the effect

that one Casserly deposited certain stocks with the defendants for safe-keeping, and authorized them to receive the dividends and pay the assessments thereon. Afterwards he duly demanded the stocks, and the defendants refused to deliver them to him. After that he was induced, by their false and fraudulent representations, to execute and deliver to them a release in writing of all his claims and demands against them. Subsequently he assigned said stocks, and all his claims and demands against the defendants, "growing out of the said fraudulent deceit," to the plaintiff, who thereafter demanded of the defendants the delivery of said stocks to him. They refused, "to his damage \$500,000," for which sum he demands judgment against them.

The refusal of the defendants to deliver Casserly's stocks to him on his demand, constituted a conversion of his property by them for which he might at once have commenced an action. But no such action was commenced within the period prescribed by law for the commencement of actions of that character; and the complaint was demurred to on that ground, among others. The demurrer was sustained, and whether properly or not is the only question which we have to consider. The appellant insists that it was not, for the reason that the action is brought to recover damages for the fraud and deceit practiced on Casserly, and the cause of action must be deemed not to have accrued until he discovered the facts constituting the fraud, which it is alleged he did not discover until within three years before the commencement of this action.

If this is an action for relief on the ground of fraud, as contradistinguished from an action of trover, the cause of action must be deemed to have accrued when Casserly first discovered the facts constituting the fraud and not before. Code Civil Proc. 338. But if the facts stated in the complaint constitute a case of wrongful conversion of personal property by the defendants, of which Casserly was advised more than three years before the commencement of this action, the demurrer was properly sustained. More than three years before the commencement of this action Casserly demanded of the defendants his stocks, and they refused to deliver them to him. He then discovered that they had wrongfully converted his property to their own use. After that he released them from all claims and demands which he had against them. They had previously wrongfully converted his stocks to their own use, and he knew it. Viewed in that light the release, if it related in any way to that transaction, released the defendants from any claim or demand which Casserly had against them for the wrongful conversion of his property, and might be set up as a defense to an action based upon such conversion. But if set up as a defense in such an action, it might be avoided by showing that it was obtained by fraud. This action is not brought to have said release canceled. And until it is interposed as a defense in some action brought by the plaintiff against the defendants to recover Cas-

serly's stocks, or damages for the conversion of them, it cannot cause any damage to the plaintiff. It was not by or through the release that possession of the stocks was obtained, or that they were wrongfully converted. And the wrongful conversion of them constitutes the *gravamen* of the plaintiff's complaint, as we construe it.

It, therefore, appearing by the complaint that the plaintiff's cause of action is barred by subdivision 3, § 338, Code Civil Proc., we must hold that the demurrer was properly sustained, and affirm the judgment.

Judgment affirmed.

We concur: MYRICK, J.; THORNTON, J.

(67 Cal. 147)

BANK OF UKIAH v. SHOEMAKE, Ex'x. (No. 8,745.)

Filed June 23, 1885.

ESTATES OF DECEDENTS—CLAIMS AGAINST—STATUTE OF LIMITATIONS.

The statute of limitations commences to run against a rejected claim on the estate of a decedent from the time of its actual rejection by the personal representative of decedent, and not from an implied rejection by failure or refusal of the decedent's representative to indorse a refusal or rejection within 10 days after presentation, as such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection after such time.

Department 2. Appeal from superior court of the county of Mendocino.

T. L. Carothers and Henley, Whipple & Oates, for appellant.

A. B. Ware, for respondent.

THORNTON, J. The court is of opinion that the rejection referred to in section 1498, Code Civil Proc., from the date of which the time for bringing an action on a rejected claim begins to run, is an actual rejection of the claim by the personal representative of a deceased person, and that it has no reference to the refusal by or neglect of the personal representative to indorse on the presented claim a refusal or rejection for 10 days after the claim has been presented to him. Such refusal or neglect to indorse may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day after the presentation. Section 1498, Code Civil Proc. This clause is inserted only to enable the claimant to bring his action after the lapse of the tenth day, if he so elect, on the occurrence of such neglect or refusal. But the period in which the action is barred does not commence to run in any event until after the actual rejection of the claim by an indorsement to that effect. It does not appear from the complaint that the claim has ever been actually rejected. We therefore think the action was commenced in time, though it was brought more than three months after the *deemed rejection*.

It follows from these views that the court erred in sustaining the demurrer to the complaint, and the judgment must be reversed, and cause remanded to the superior court of Sonoma county, with a di-

rection to that court to overrule the demurrer, and for such other proceedings as may be in conformity with law.

So ordered.

We concur: SHARPSTEIN, J.; MYRICK, J.

(2 Cal. Unrep. 485)

ALLEN v. HOLT and others. (No. 8,997.)

Filed June 23, 1885.

COMPLAINT IN EJECTMENT.—ALLEGATIONS OF OWNERSHIP.

In an action of ejectment, a complaint that alleges ownership in fee in plaintiff, and an ouster by defendant on a day named, before commencement of the action, is sufficient, without further alleging that plaintiff was the owner in fee at the commencement of the action. (On authority of *Salmon v. Symonds*, 24 Cal. 264.)

Department 2. Appeal from superior court of the city and county of San Francisco.

Saffold & Menz, for appellant.

H. A. Powell and *F. M. Husted*, for respondent.

THORNTON, J. Appeal from an order granting a new trial. The complaint in this case states facts sufficient to constitute a cause of action. The point as to the averment of ownership is settled by the case of *Salmon v. Symonds*, 24 Cal. 264. See, also, *Kidder v. Stevens*, 60 Cal. 414; *Van Rensselaer v. Bonesteel*, 24 Barb. 370; *Teetshorn v. Hull*, 30 Wis. 167. The court therefore erred in granting a new trial on the ground that the complaint was defective in not stating a cause of action. We see no ground on which the order can be sustained. The order is reversed, and cause remanded, with directions to the court below to deny the motion for a new trial.

So ordered.

We concur: SHARPSTEIN, J.; MYRICK, J.

(87 Cal. 141)

DURYEA and others v. BOUCHER and others. (No. 8,754.)

Filed June 22, 1885.

1. LOCATION OF MINING CLAIM.—NOTICE OF.—ERROR IN DESCRIPTION.

The description in a notice of location of a mining claim, specifying the number of acres claimed, is sufficient, if it designate the land by the adjoining tracts on the north, east, and south, and by unoccupied lands on the west; and the insertion of the wrong legal subdivisions will not invalidate it.

2. DEEDS.—DESCRIPTION IN, HOW CONSTRUED.

It is a rule of construction of deeds that as soon as there is an adequate and sufficient description, with convenient certainty of what is intended to pass by the particular instrument, an erroneous addition will not vitiate it. So much of the description as is false will be rejected, and the instrument will take effect if a sufficient description remains to ascertain its application.

Department 2. Appeal from superior court of the county of Calaveras.

W. E. Turner, for appellants.

Luis & McFarland and A. C. Adams, for respondents.

THORNTON, J. We think that the location of the mining claim by plaintiffs in July, 1876, was made in accordance with law, and included the 10 acres in controversy. The notice as recorded and posted was sufficient. It described the land by the adjoining tracts on the north, east, and south, and on the west by unoccupied lands. As the claim was for 30 acres, its boundary on the west could be easily determined. It makes no difference that the wrong legal subdivisions are inserted in the notice. These may be rejected as false where the remaining description sufficiently identifies the land in accordance with the maxim, *falsa descriptio non nocet cum de corpore constat*. Broom, Leg. Max. 605; 1 Greenl. Ev. § 301. The rule may be thus stated: As soon as there is an adequate and sufficient description, with convenient certainty of what is intended to pass by the particular instrument, an erroneous addition will not vitiate it. So much of the description as is false will be rejected, and the instrument will take effect if a sufficient description remain to ascertain its application. The court finds that the plaintiffs did work on the land in dispute, and there is evidence to support it.

It is urged that the finding of the court below as to the location of the defendants Gleason and O'Neil of the 10 acres in controversy is contrary to the evidence, inasmuch as the 10 acres are described in the finding as being in the *south-west* quarter of section 13, township 5 N., range 11 E. The evidence shows beyond dispute that the tract of 10 acres is in the south-east quarter, and therefore the finding is not sustained by the evidence. But the other findings, which are sustained by the evidence, and the conclusions of law which are properly deduced, show that the plaintiffs are entitled to a judgment in their favor if the description of the land in the finding was, as it should be, the south-east quarter. Under such circumstances the cause should not be sent back for a new trial.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MYRIK, J.

(67 Cal. 149)

MCGREGOR, Adm'x, etc., v. DONNELLY. (No. 8,967.)

Filed June 23, 1885.

SWAMP AND OVERFLOWED LANDS—CONTRACT FOR PURCHASE OF—VALIDITY OF.

Where parties enter into a contract, whereby one is to make application for and purchase swamp and overflowed lands, under the California act of April 27, 1863, for the use and benefit of the latter, and, in pursuance thereof, such purchase is made, and certificate of purchase thereafter issued to the purchaser, an action cannot be maintained to compel the specific delivery of the certificate, under the original contract, as such contract was illegal in its inception, and violative of the act of 1863; and the parties thereto being *in pari delicto*, neither should be allowed to recover.

Department 2. Appeal from superior court of the county of Monterey.

J. D. H. Chamberlain and James Hanna, for appellant.

S. M. Buck, for respondent.

THORNTON, J. In this case the evidence shows, and it is substantially found, that by an arrangement made between John McGregor, plaintiff's testator, and S. S. Soule, the former made an affidavit and application for the purchase from the state of certain swamp and overflowed lands, lying in the county of Humboldt, for the use and benefit of the latter. Soule was to pay the cost and expense attendant on the application to purchase, and such cost and expense were either paid by him, or by Ryan claiming under him. To state the facts more particularly, Soule paid the county surveyor all his fees, charges, and expenses for surveying, platting, and making the field-notes of the land covered by the application. He paid the 20 per cent. of the purchase price of the lands and the first year's interest on the remainder of the price. At this stage in the proceeding to purchase, Soule substituted Ryan in his place, and Ryan after this paid whatever expense was necessary up to the procurement of the certificate of purchase. The application was made under the act of April 27, 1863, (see St. 1863, p. 591,) on the twentieth of March, 1865, and the certificate of purchase was issued on the nineteenth of January, 1866. McGregor died testate on the twelfth day of September, 1865. The certificate after its issuance got into the hands of Ryan, who delivered it to defendant, to whom, after the certificate was issued, Ryan sold and conveyed the land involved herein. The certificate was in possession of defendant when this action was brought.

The plaintiff, the administratrix, with the will annexed, of John McGregor, brings this action, which is an action in equity, to compel the specific delivery by defendant of the certificate of purchase to her. The action here is brought to recover the result or fruit of the arrangement or contract made between plaintiff's testator and Soule. Ryan and defendant claim under this arrangement, and are in privity with Soule. Ryan took Soule's place, and defendant, Donnelly, took the place of Ryan. It is contended on behalf of defendant that this contract was illegal in its inception, and therefore that plaintiff cannot recover the certificate which was issued upon it. We are of opinion that the contention of the respondent is sound. The contract, within the rule laid down in *Churchill v. Anderson*, 56 Cal. 56, which we approve, is violative of the statute by authority of which the purchase in this case was attempted to be made, and therefore void. In the case cited, as in this, the proceeding to purchase was under the act of 1863 above referred to. The case cited was in regard to an application to purchase lieu lands, and in that respect it differs from this; but the provisions of the act of 1863, referred to in the opinion in *Churchill v. Anderson*, on which the conclusion is there reached, apply alike to the swamp and overflowed lands involved herein.

We are of opinion that the intent of the act of 1863, manifested by

the provisions referred to in the case in 56 Cal. 56, was plainly that the application and purchase authorized by it was to be for the benefit of the applicant himself; that this was distinctly the policy of the act, —a policy adopted to prevent the acquisition of large tracts of land by one person through the use of other persons.

The affidavit made in this case, as required by the statute, states that the applicant has not entered, under the provisions of any law of this state providing for the sale of swamp and overflowed lands, any other land which, with the land sought to be purchased, shall exceed 640 acres. If such evasion of the statute as is attempted in this case should be allowed, it would be a very easy matter for one who had acquired under the laws above mentioned 640 acres, and therefore could not take the oath prescribed, by the employment of others who could take the oath, to acquire for himself, in manifest disregard of the intent and policy of the act, many times 640 acres.

It is contended that the plaintiff should recover because she does not rely on the illegal contract for a recovery herein. We cannot so understand the pretension of plaintiff. It is true, an attempt is made to eliminate from the transaction the contract altogether, by relying on that portion which McGregor could lawfully do if acting for himself, and rejecting everything as to the agreement with Soule. But the contract was entire, and, as was said by SELDEN, J., in *Tracy v. Talmage*, 14 N. Y. 191: "It is contrary to all the rules which have been applied to illegal contracts to discriminate between their different parts, and hold one portion valid and the other void."

Reliance is placed in this case by plaintiff on the affidavit and application of McGregor, the fact that all the proceedings were taken in his name to effect the purchase, and the further fact that the certificate of purchase was issued in his name. But every step taken, was taken in pursuance of the agreement made between McGregor and Soule. *Non constat* that the affidavit and application would ever have been made if this agreement had not been entered into. McGregor did not wish to purchase. In fact he did not purchase. He paid nothing, and never intended to pay anything. He was a mere *dumb, passive instrument* in the hands of Soule to accomplish a purpose forbidden by law. McGregor assisted Soule in this illegal purpose in every way Soule desired his assistance. By their joint acts, each and all of which were illegal, a result forbidden by law was accomplished. Neither McGregor, nor plaintiff claiming under him, should derive any benefit from it. All of the parties concerned are *in pari delicto*, and neither, in our opinion, should be allowed to recover. See *Biggs v. Lawrence*, 3 Term R. 454; *Chugas v. Penaluna*, 4 Term R. 466; *Waymell v. Reed*, 5 Term R. 599.

We make this remark in relation to defendant's claims set up in his cross-complaint, which we have fully examined. Neither at law nor in equity should either be permitted to recover. But it is said the evidence showing the illegality of the contract came from Soule

and Ryan, who were incompetent witnesses, and their evidence inadmissible under section 1880, Code Civil Proc. The action of plaintiff is not one against an executor or administrator upon a claim or demand against an estate of a deceased person. It is an action brought to recover something claimed to belong to the estate against a third person, brought by the administratrix to enforce a demand by the estate. Under such circumstances we see no reason why Soule and Ryan were not competent witnesses, and their testimony admissible. The parties are *in pari delicto*; neither can recover, and in such case the law leaves the parties as they were. These views dispose of the case and it is unnecessary to say anything upon the other points discussed by counsel.

The judgment and order are reversed and the cause remanded, with a direction to the court below to dismiss the action, each party to pay his own costs in that court.

We concur: SHARPSTEIN, J.; MYRICK, J.

(67 Cal. 137)

ESCOLLE v. FRANKS. (No. 8,518.)

Filed June 23, 1885.

SALES—ESTOPPEL OF CREDITORS OF VENDOR TO DENY VALIDITY.

Where the creditor of a vendor of personal property, subsequent to the sale, recognized the vendee's title, and caused the property to be turned over to the latter, and the vendee upon the faith of such acts took the property and made large expenditures in its care, which otherwise he would not have done, he, the creditor, cannot then question the validity of the sale on the ground that it was not accompanied by an immediate delivery and continued change of possession.

Department 1. Appeal from superior court of the county of Monterey.

D. M. Delmas, for appellant.

W. H. Webb and *Jas. A. Wall*, for respondent.

Ross, J. The contest in this case is between a purchaser of personal property and a creditor of the vendor. A certain lot of sheep constitutes the subject of the controversy. It is not denied, and was expressly found by the court below, that the plaintiff bought the sheep from the owner, one Gout, in good faith and for value; but it is contended by the defendant, and was found by the court below as a fact, that the sale was not followed by an immediate delivery and continued change of possession. This finding is assailed by the plaintiff, upon the ground that it is contrary to the evidence in the case, but we find it unnecessary to pass upon that point, for the reason that it appears in the case that after the attachment of the sheep, which occurred at the instance of the creditor of Gout, subsequent to the sale by the latter to the plaintiff, the creditor whose name is Tresconi sent for the plaintiff to have a talk about the sheep, and a settlement of the matter. He said to plaintiff that Gout and one

Despney owed him money, and that he had sued them for it, and attached the sheep. The plaintiff replied that he had bought the sheep from Gout, and had paid him \$1.25 per head for them. Tresconi said that if he had known that, he would not have attached them, and that he would have them released and returned to the plaintiff. Plaintiff told Tresconi not to do so if he thought he had a better right to the sheep than plaintiff. Tresconi then asked plaintiff, if he released the attachment, if plaintiff would sue him for damages, to which plaintiff responded, "No." Tresconi then caused the sheep to be released, and to be turned over by the sheriff to the plaintiff, who took them, and subsequently expended about \$400 in and about the care of them, which he would not have expended but for the conduct of Tresconi in the matter of the release.

Under these circumstances Tresconi cannot be heard to question the sale by Gout to the plaintiff, upon the ground that it was not followed by an immediate delivery and continued change of possession. The sale was good as between the parties to it. The evidence, as well as the findings, show that it was made in good faith and for full value, and that there was no intent on the part of the vendor or vendee to hinder, delay, or defraud the creditors of the former. If a creditor make any statement or agreement in effect confirming the sale, "upon the faith of which the grantee acts as he would not otherwise do, or under such circumstances that his subsequent assertion of his rights as a creditor, if permitted, would operate as a fraud, he will be held to have confirmed the transfer." Bump, Fraud. Con. 458, and authorities there cited. In this case Tresconi recognized plaintiff's purchase, released his attachment, caused the sheep to be turned over to the plaintiff, and upon the faith of those acts the plaintiff took the sheep and expended about \$400 in and about their care, which he would not otherwise have done. After all this, to permit Tresconi to question the sale would be to countenance a palpable fraud on the plaintiff.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKINSTRY, J.; McKEE, J.

(67 Cal. 127)

MAIN v. CASSERLY and others. (No. 8,913.)

Filed June 23, 1885.

CORPORATIONS—CONTRACTS *ULTRA VIRES*—PROMISSORY NOTES.

A corporation that has received and retained the consideration of a promissory note, given for its benefit, cannot deny its liability thereon, on the ground that the contract was *ultra vires*.

Department 1. Appeal from superior court of the city and county of San Francisco.

W. S. Goodfellow, for appellant.

J. H. Smith, for respondents.

McKee, J. This is an action against the stockholders of a corpo-

ration, organized under the laws of the state, by the name of "Lassen County Land and Flume Company," to recover judgment upon a promissory note in words and figures following:

"\$8,250.

SAN FRANCISCO, July 25, 1877.

"Twelve months after date, for value received, the Lassen County Land and Flume Company promise to pay to the order of Henry Toomy eight thousand two hundred and fifty (8,250) dollars in United States gold coin, without interest. In case of non-payment at maturity, this note shall bear interest at 10 per cent. per annum until paid.

[Signed]

[Corporate Seal.]

"EUGENE CASSERLY, President, etc.

"F. R. BUNKER, Secretary."

The payee of the note was a stockholder of the corporation and owner of 5,500 shares of its stock. At the same time he was largely indebted to the corporation; and he proposed, if the company would buy his stock at a stipulated price and give him its promissory note to secure payment of the same, that he would negotiate a sale of the note, and apply the moneys which he received for it in payment of his debt to the corporation. The company agreed; purchased the stock by the formalities required by law; and executed and delivered to him the note in suit, which he sold, indorsed, and delivered to the plaintiff before maturity; and, out of the moneys received in the transaction, he paid into the treasury of the corporation several thousand dollars in satisfaction and discharge of his indebtedness to the corporation. By the executed agreement the company has therefore received 5,500 shares of stock and several thousand dollars, which it proposes to keep, and repudiate its promissory note, upon the ground that the transaction was *ultra vires* and void.

Assuming that the contract of purchase was *ultra vires*, the law does not allow a corporation to retain the benefits which it has received from the contract and escape liability upon it. "The invalidity of a contract," says Mr. Sedgwick, in his work on Statutory and Constitutional Law, p. 73, "is subject to the equitable exception that, although a corporation in making a contract acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract the fruits of which he retains."

The exception referred to is founded upon the fact that the contract, though invalid, has been executed in the interests of the corporation, and for its benefit and advantage. Where, therefore, it has received the fruits of such a contract, it cannot refuse payment on the ground that it had no power to contract. It would be otherwise if the contract had not been executed. The law of the subject is thus expressed in *Bradley v. Ballard*, 55 Ill. 413:

"While a contract remains executory the powers of corporations cannot be extended beyond their charter limits for the purpose of enforcing it. Not only so, but on the application of a stockholder or of any other person authorized to make the application, a court of chancery would interfere, and forbid the execution of a contract *ultra vires*. * * * But if one of the contracting parties proceeds in the performance of the contract, expending his money and his labor in the production of value, which the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its power.

"In cases of such a character courts simply say to corporations, you cannot, in this case, raise the question of your power to make the contract. It is sufficient that you have made it, and, by so doing, have placed in your corporate treasury the fruits of others' labors, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter."

Upon this principle rests the cases of *Pizley v. Western P. R. Co.* 33 Cal. 198, and *Foulke v. San Diego & G. S. P. R. Co.* 31 Cal. 365, decided by this court.

The parties contracted that in case of non-payment at maturity, the note should bear interest until paid; and there was no error in computing interest on it from its date and not from the time of default. *Hackenberry v. Shaw*, 11 Ind. 392; *Parvin v. Hoopes*, 1 Morris, 294.

We find no prejudicial error in the record. Judgment affirmed.

We concur: MCKINSTRY, J.; ROSS, J.

(2 Cal. Unrep. 486)

GILSON v. ROBINSON. (No. 8,268.)

Filed June 23, 1885.

1. STATE LANDS, PURCHASE OF—CERTIFICATE, CONCLUSIVENESS AS TO TITLE.

A certificate of purchase issued to one of two applicants for certain state lands is not conclusive (in a contest to determine the right of the applicants to acquire title from the state to such land) of the right of the holder of such certificate to purchase as against the other applicant who is in adverse possession of the land; each party to such contest must prove the right which he asserts and claims, and he has no enforceable claim in absence of proof of the facts upon which such right depends.

2. SAME—CERTIFICATE OF PURCHASE—EFFECT OF ISSUE BEFORE FILING PLAT.

A certificate for the purchase of state lands is void if issued before the plat of survey of the township has been approved by the government officer or filed in the proper office.

Department 1. Appeal from the superior court of the county of Monterey.

Wm. H. Webb, for appellants.

T. Beeman, for respondent.

McKEE, J. This is a contest involving the right to acquire title from the state to the south-east quarter of section 36, in township 15 S., range 2 E., Mount Diablo meridian. The right was awarded to the plaintiff, and from the judgment defendant appeals. The first application to purchase was made by the defendant. On the twenty-

first of October, 1870, he filed his application in the office of the surveyor general of the state. On the twenty-ninth of December, 1873, the surveyor general approved it; the applicant made the first payment as required by the statute under which the application was made, and the register of the state land-office issued to him a certificate of purchase.

The defendant was not in possession of the land when he applied to purchase it; and, in fact, it was in the actual adverse possession of another, who had settled upon it in the year 1869, inclosed part of it with a substantial inclosure, within which he made valuable improvements, and resided until the year 1871, when he sold and conveyed the entire tract to the mother of the plaintiff, who, having entered under her deed, occupied and used the land until 1873, when she died upon the land, leaving the plaintiff, as her only son and heir at law, in possession; and he has, since her death, had actual possession. The approved plat of the survey of the township in which the land is situated was not filed until the twenty-seventh of November, 1874; and after the same had been filed, the plaintiff, on the thirteenth of January, 1875, being in the actual possession of the land described on the plat as the south-east quarter of section 36, range 2 E., Mount Diablo meridian, made and filed an application to purchase the 80 acres of the said quarter section upon which his building and improvements were located; and afterwards, on the fifth of April, 1876, before any action was taken upon his application, and before any intervening adverse rights in or to the quarter section had accrued or attached, he amended the application asking to be allowed to purchase the entire quarter section, of which he was in the actual possession. Each applicant, at the time of his application, was qualified and competent to purchase.

In the trial of the contest the defendant gave no evidence tending to prove that in the application which he made he based his right to purchase upon occupancy in himself or want of occupancy by any one else. He rested his right solely upon the approval of his application by the surveyor general, and upon the certificate of purchase issued to him by the register of the state land-office, and payment of the first installment of the purchase money. But the certificate of purchase did not vest him with the title to the land; the title remained in the state, and the payment gave him merely an equity as against all persons who had not a prior or paramount right to purchase from the state. The issuance of the certificate was therefore not conclusive of his right to purchase, as against the plaintiff who was, in fact, in the adverse possession of the land. Section 1925, Code Civil Proc., declares that the apparent right of the holder of such a certificate "may be overcome by proof that, at the time of the location, * * * the land was in the adverse possession of the adverse party as those under whom he claims." The plaintiff, being in the adverse possession, had, therefore, a paramount right to pur-

chase. *Conlan v. Quinby*, 51 Cal. 413. Besides, as to him the certificate was void, because it was issued before the plat of survey of the township had been, by the government officer, approved or filed in the proper office. *Medley v. Robertson*, 55 Cal. 396.

Under these circumstances the defendant could not predicate a right to purchase merely upon the approval of his application by the proper officer of state. No presumption arises from that fact in his favor, that his application stated the requisite facts to entitle him to the right. In a contest as to such a right between himself and another, each party is an actor, and he is bound to prove the right which he asserts and claims. In the absence of proof of the facts upon which the right depends, he has no enforceable claim. *Hildebrand v. Stewart*, 41 Cal. 287; *Woods v. Sawtelle*, 46 Cal. 391.

Judgment affirmed.

I concur: MCKINSTRY, J.

I concur in the judgment: ROSS, J.

(67 Cal. 139)

CAMPE v. LASSEN. (No. 9,877.)

Filed June 23, 1885.

1. JURISDICTION—JUDGMENT, HOW PLEADED.

A judgment of the superior court, being a court of general jurisdiction, is sufficiently pleaded by an allegation that judgment was recovered in an action pending between the parties in the superior court of a given county, and the facts conferring jurisdiction need not be alleged; they are presumed by law.

2. FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE.

Where, in an action to set aside a deed, on the ground that it was made to hinder, delay, and defraud the plaintiff, the averments of the complaint are not denied, evidence that the plaintiff was a judgment creditor of the defendant need not be offered to sustain an allegation thereof.

Department 1. Appeal from superior court of the county of Monterey.

F. J. Castlehun, for appellant.

Fox & Kellogg, for respondent.

MCKEE, J. This is a suit in equity to set aside a deed made by the defendant C. Lassen to his co-defendant, on the ground that it was made to hinder, delay, and defraud the plaintiff of his judgment. At the trial the plaintiff gave no evidence that he was a judgment creditor of the defendant C. Lassen, and the court found that he was not, and dismissed the suit. But the complaint contained the following allegations, which were not denied:

"That on the nineteenth day of September, 1883, in the superior court of the city and county of San Francisco, state of California, said plaintiff recovered a judgment against the said defendant, C. Lassen, *alias* N. C. Lassen, for \$1,174.34, principal and interest, and \$12 cost of suit, in an action wherein this plaintiff was plaintiff, and the defendant, C. Lassen, *alias* N. C. Lassen, was named defendant.

"That on the nineteenth day of September, 1883, said judgment was entered in the office of the clerk of said superior court of the county of San Francisco, state of California, and on the fifteenth day of November, 1883, a transcript of said judgment was filed in the office of the county recorder of San Mateo county, state of California, the county in which said defendants lived at the time said action was begun, and in which they still live."

If well pleaded these allegations are admitted to be true; and we think they sufficiently present an issuable fact of the rendition of a judgment in favor of the plaintiff and against the defendant in a court of general jurisdiction. It is contended, however, that the facts showing the jurisdiction of the court should have been stated. In other words, it should have been stated that an action had been properly commenced to put in motion the jurisdiction of the court over the subject-matter of the action, and that the court had acquired jurisdiction of the parties to the action. But the allegation is, broadly, that the judgment was recovered in an action pending, between the parties, in the superior court of the city and county of San Francisco, and the legal presumption is that that court, being a court of general jurisdiction, had jurisdiction to render the judgment. In pleading a judgment of a court of general jurisdiction there is, therefore, no necessity for averring the facts which confer jurisdiction; they are presumed by law. The findings of the court being against the admissions of the pleadings, the judgment appealed from is erroneous.

Judgment reversed, and cause remanded for further proceedings.

We concur: MCKINSTRY, J.; SHARPSTEIN, J.

(67 Cal. 159)

RAYNOR v. MINTZER. (No. 9,755.)

Filed June 23, 1885.

1. TRUSTS—PURCHASE BY TRUSTEE—CONSPIRACY TO DEFRAUD BENEFICIARY.

Trustees are guilty of a fraud on their *cestui que trust*, when they enter into a conspiracy with his creditor, whereby the creditor procures a judgment against the *cestui que trust*, under which the latter's interest in the trust-estate is sold under execution, and conveyed to the trustees; and the trustees will be compelled, on repayment of the purchase price, to reconvey the property so acquired to the *cestui que trust*.

2. ACTION FOR RECONVEYANCE—PARTIES TO.

All persons should be made parties to an action to compel reconveyance of property which was fraudulently conveyed, who are interested in the controversy or may be affected by the decree, though the interests of all may not be affected alike; and in the final disposition of the case, the court may dismiss as to some on the ground that they have no interest in the controversy, nor will be affected by the result.

In Bank. Appeal from superior court of the county of San Bernardino.

A. B. Hotchkiss, for appellants.

Paris & Goodcell and Bennett & Wiggington, for respondent.

McKEE, J. This is a suit in equity to set aside a money judgment, declare void an execution sale made under it, and annul and cancel

the certificate of sale and sheriff's deed made to the defendants; or to have the defendants, the grantees named in the deed, adjudged trustees for the plaintiff, in respect of all property belonging to him and transferred to them by the sheriff's deed, and to compel them to reconvey the same to the plaintiff upon such terms as may be just, etc. Plaintiff claims to be entitled to the relief demanded, upon the ground that the action, in which the judgment was recovered, was commenced against him and prosecuted to judgment and execution sale by the plaintiff in the action, not of his own motion, nor in his own behalf, but at the instigation of the defendants, and for their benefit, upon an arrangement or conspiracy between them to use, under cover of the plaintiff's name, the proceedings and legal process in the case for the purpose of fraudulently acquiring to themselves Raynor's interest in the lands and premises described in the complaint. The object of the suit is therefore to obtain restitution from the defendants of real property of the plaintiff claimed to have been acquired, and to be held, by them by fraud.

The frauds by which it is claimed the defendants acquired the property arose out of the following transactions: Raynor was insolvent and wholly unable to pay anything to his creditors; but he claimed to be a tenant in common with the defendants, Mintzer, Fox, Peacock, Hunt, Cameron, and Davis, to the extent of an undivided four-sevenths interest in the real property described in the complaint; and that his co-tenants had fraudulently acquired from him his interest, and, after acquiring the same, had organized themselves into a corporation by the name of the Colton Land & Water Company, of which they became the only members or stockholders, and to which they transferred the entire common property, which constituted the only capital stock of the corporation, and the same was apportioned among them according to their respective interests in the property. Having thus acquired title to the property, the corporation commenced an action to quiet title against Raynor, and to enjoin him from asserting any claim to the property. He appeared in the action and filed an answer containing a cross-complaint, in which he asked, as affirmative relief, that he be adjudged the owner of an undivided four-sevenths interest in the property conveyed by his co-tenants to the corporation; and that they and the corporation be adjudged to hold the same in trust for him, and be compelled to reconvey it to him. On the final hearing of the case the court decided in his favor, adjudged that he was the owner of an undivided four-sevenths of the property conveyed to the corporation, and entitled to a reconveyance of the same from the corporation and the other defendants; and it commanded them to execute and deliver to him a conveyance of the same. With that adjudication the defendants were dissatisfied and appealed to this court. On the hearing of the appeal, this court, at the January term, 1881, modified and affirmed the judgment of the superior court, (see *Colton Land & Water Co. v. Raynor*, 57 Cal. 588;)

and Raynor's ownership and interest in the property was, by that adjudication, fully and legally established.

But pending that appeal, the appellants in the action set to work to evade the judgment appealed from, if the appeal should be decided against them. For that purpose they stirred up the creditors of Raynor to sue him upon their claims, and have whatever interest in the property might be finally adjudged to him, levied on and sold. This they did by intimations that the corporation would buy from them whatever interests they might thus acquire. C. P. Clyde was one of Raynor's principal creditors, and an arrangement was made with him whereby he agreed to commence an action upon his claim of \$1,800 against Raynor and prosecute it to judgment, execution, levy, and sale, for the benefit of the appellants, who were to pay him the amount of his claim, after he had obtained a sale of the property under the judgment, and transferred to them the certificate sale. Clyde carried out this arrangement by commencing an action against Raynor, in which he obtained judgment by default, upon which an execution was issued, which was levied upon Raynor's interest in the property. At the execution sale Clyde bought the property in his own name; but the sheriff refused him a certificate of sale because the appellants failed in their promise to pay the fees; and in order to obtain the certificate, Clyde agreed with them to take \$1,000 for the interest in the property acquired by the sale, and pay the sheriff's fees. That was done, the fees were paid, the sheriff issued to him a certificate of sale, which he immediately assigned to appellants. The entire transaction was commenced and consummated pending the appeal.

This transaction the court found was, in itself, an open attempt to evade the judgment appealed from, and to acquire in an indirect manner the property which had been adjudged to Raynor, and also a continuation of the scheme, stamped in the action in which the appeal was pending, as "a fraud on the rights of Raynor attempted to be carried out by means of the cloaked machinery of a corporation." It therefore ordered all the defendants in the action, except Clyde and the corporation, as trustees of Raynor's title in the property acquired by the sheriff's deed on the Clyde judgment and execution, to reconvey the same to Raynor upon payment of the \$1,000, and interest thereon, which they had given Clyde for the assignment to them of the certificate of sale. This relief, it is insisted, "is contrary to law and equity," and is based upon findings which do not cover the issues raised by the pleadings in the case, and are not sustained by the evidence. We cannot agree with this contention. The evidence sustains the findings, the findings cover the issues, and the decision and judgment are in accordance with the plainest principles of equity. When title to real property has been acquired by fraud, the true owner is entitled to be relieved against the fraud, and to be reinvested with his ownership upon such terms as may be just. The terms upon which the relief was granted were just. By its decree the court un-

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did the wrong which had been done, and left all the parties to the transaction in possession of their legal rights as they were before the assignment of the certificate of purchase; Raynor was restored to his original position as a tenant in common with his co-tenants in the property, upon paying to them the moneys which they had paid to Clyde for his interest in the property. Upon receiving that money they had no longer any right in his property which they could in conscience retain. For it is conceded that, originally, Raynor was a tenant in common with them in the property, and when they assumed the exclusive possession of it under the transactions with him and the instruments in writing executed by him, adjudicated in the case of the *Colton Land & Water Co. v. Raynor*, they held the apparent legal title to his interest in the common property in trust for him. This title, whether held by him, or by them in trust for him, vested him with the right to his share in the property, and in the proceeds derived from it under the arrangement between the tenants in common as to the management and disposition of the property as adjudged in that case. The fact that the co-tenants in exclusive possession cloaked themselves in the garb of a corporation, and conveyed the property to themselves in the corporate name, did not divest Raynor of his rights. His co-tenants were still, in the shape which they saw fit to assume, the trustees of his legal title, and that fiduciary relation continued to exist, binding them in all their transactions with the property, to the observance and practice of good faith to their co-tenant and *cestui que trust*.

From the obligations of that relation they could not relieve themselves by any transfer of the property to themselves in the name of a corporation into which they changed themselves, nor by a transfer to any other person who knew of the existing relation, nor by indirect and crooked attempts to acquire the trust property for themselves. Nor did the judgment of the court, in the case of the *Colton Land & Water Co. v. Raynor*, relieve them from their obligation, or discharge them from their trust as to the plaintiff's title. That judgment established the trust and decreed its performance; but before performance, and while proceedings were pending to revise the decree itself, they attempted to avoid performance by the acquisition of the trust property to themselves by means of the judgment and execution sale. Against such proceedings the plaintiff was entitled upon every principle of equity to be relieved.

There was no substantial error in overruling the demurrer to the complaint, on the ground that the complaint did not contain facts sufficient to entitle the plaintiff to any relief, or that several causes of action were improperly united, or that Clyde and the Colton Water Company were improperly joined as defendants.

The complaint contains a voluminously specific statement of facts constituting the alleged frauds by which the defendants acquired to themselves title to the plaintiff's property. These acts of fraud, it

is charged, were parts of one entire scheme to divest the plaintiff of his rights, and, although numerous, they constitute but one cause of action, upon which plaintiff would be entitled to either alternative or discretionary relief. In this view, Clyde and the Colton Land & Water Company were proper parties. Clyde was a proper party because he was one of the principal actors in so much of the alleged frauds, which were the basis of the plaintiff's action, by which the other defendants, through him, acquired the trust property. In the investigation of the alleged frauds, and the relief which might be decreed to the plaintiff, the judgment which Clyde recovered against Raynor, and through which the other defendants claimed Raynor's title, was directly challenged, and he had a right to be heard in any action or adjudication which might affect the validity of the judgment and the proceedings under it.

The Colton Land & Water Company was also a proper party, because the complaint alleged "that the defendant the Colton Land & Water Company claims to have acquired some interest in said real property, under and by virtue of said deeds from said Clyde and said sheriff, adverse to the plaintiff, which claim is invalid and without foundation." It is a general rule that all parties interested in a controversy, or who may be affected by a decree rendered therein, should be made parties; all who are nominally or really interested may therefore be joined, although the interests of all may not be affected alike by the relief which may be granted, and the court may, in the final disposition of the case, dismiss as to some of them on the ground that they neither have nor claim any interest in the controversy. Upon the face of the complaint, both Clyde and the corporation were proper, if not necessary, parties to a complete determination and settlement of the questions involved in the controversy. We see no prejudicial error in the record.

Judgment and order affirmed

We concur: THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.;
ROSS, J.

(67 Cal. 135)

ROBINSON v. IRISH-AMERICAN BEN. SOC. (No. 8,862.)

Filed June 23, 1885.

BENEVOLENT ASSOCIATION—CLAIM FOR BENEFITS.

Where a person, who is a member of a benevolent association which pays a certain allowance in case of illness, on compliance with certain regulations, on becoming a member, assented to the provisions and regulations of the society, he is not entitled to maintain an action for such allowance during his illness, unless he show compliance with such regulations.

Department 1. Appeal from superior court of the city and county of San Francisco.

M. C. Hassett, for appellant.

H. A. Powell, for respondent.

Ross, J. The defendant is a benevolent corporation organized under the laws of the state, its object in part being the relieving and assisting of its sick members. The plaintiff became a member in 1869, and has since been a member thereof in good standing and entitled to all its benefits. The constitution governing the corporation provides for the election of a physician, whose duty it is to attend the sick members and, among other things, "give a certificate of bad health when applied to and the case warrants it." It is also provided by the constitution that "any beneficial member of this society who is sick, and receives the doctor's certificate, shall be entitled to eight dollars per week during the continuance of his illness, provided such sick member shall not be absent from his house later than 8 o'clock P. M.; and it shall be the duty of the society's physician to send in a written statement every two weeks, stating how such sick member is getting on, and also send certificate of sickness at the same time, stating the nature of his disease," etc. It is further provided that the board of trustees, provided for by the constitution, and who are required to hold their regular meetings on the Friday evening preceding the regular meetings of the society, "shall investigate all complaints connected with the affairs of the society, and the recording secretary shall report the same at the following meeting. They shall have full power to act in all cases submitted to them by the society, and from their decisions there shall be no appeal. * * * No moneys shall be withdrawn from the deposit unless by a majority of the board of trustees. They shall also examine all claims of members for sick allowance, and if found correct order the same paid."

It appears from the record that on the third of October, 1881, the plaintiff demanded of the society payment to him of \$352, which he claimed to be due him as sick allowance, accruing subsequent to November 29, 1880. The claim was presented to the society at its regular monthly meeting, which was held the evening of the day of the demand, and was by the society referred to its board of trustees. Instead of awaiting the consideration and determination of the board, the plaintiff, within a few days, commenced this suit against the society to recover the amount claimed by him. He undoubtedly did so, as appears from the record, because the physician, at the instance of one of the trustees, had some time before ceased furnishing the plaintiff with a certificate of his illness. It clearly appears from the evidence that plaintiff was sick and unable to work during the time for which he claimed the allowance, and had been so circumstanced for a long time prior thereto. But it is not to be presumed that the board of trustees would, upon the facts being made to appear, have refused to award the plaintiff the relief to which he was entitled. At all events, the plaintiff, when he became a member of the society, assented to the provisions of its constitution and by-laws, and is bound by them. The constitution of the society, in terms, provides that the board of trustees shall examine all claims of members for

sick allowance, and, if found correct, order the same paid. In this case, without even giving the board an opportunity to examine his claim, the plaintiff resorted to suit. See *Anacosta Tribe, No. 12, Improved Order of Red Men, v. Murbach*, 13 Md. 91, and *Vandyke's Case*, 2 Whart. 309.

Judgment and order reversed.

We concur: McKEE, J.; McKINSTRY, J.

(69 Cal. 207)

SAYRE v. CITIZENS' GAS-LIGHT & HEAT Co. and others. (No. 8,785.)

Filed June 23, 1885.

EQUITY—RELIEF—EFFECT OF ACQUIESCENCE AND DELAY.

Relief in equity will be barred by reason of acquiescence in a transaction, and delay in seeking relief therefrom.

Department 1. Appeal from superior court of the city and county of San Francisco.

Geo. Cadwalader and *Geo. R. B. Hayes*, for appellant.

McAllister & Berghin, for respondent.

Ross, J. This is a bill in equity filed by plaintiff to compel the defendants Brown, Clark, Gallatin, Watson, Cummings, Stanford, Hopkins, Crocker, Huntington, and Miller to transfer to the plaintiff, as assignee of one Henry G. Morris, 3,500 shares of the capital stock of the defendant the Capital Gas Company, and to pay to him the dividends received by them thereon; to compel the Capital Gas Company to recognize such transfer and enter the same on its books; and to obtain judgment against the defendant the Citizens' Gas-light & Heat Company for \$11,900. From the findings of the court below these among other facts appear: The Citizens' Gas-light & Heat Company was incorporated in January, 1872, with a capital stock of \$1,000,000, divided into 20,000 shares of the par value of \$50 each, and on the fourth of October of that year entered into a contract in writing with one Henry G. Morris, of Philadelphia, by which the latter agreed to erect gas-works for the company in the city of Sacramento within a stated time, in accordance with certain plans and specifications, in consideration of \$100,000 in money and 6,500 shares of the stock of the company, which consideration the company agreed to pay. Morris proceeded to and did construct the gas-works, but did not complete them within the time limited in the contract; the works not having been completed until on or about February 4, 1874, whereas the time stipulated for their completion was September 1, 1873.

The company paid Morris the \$100,000, as provided for by the contract, and issued to him 4,500 shares of its capital stock; and further advanced to him, to enable him to complete the works, other sums, aggregating \$41,371.33, which advances have never been repaid. The incorporators of the Citizens' Gas-light & Heat Company formed the

corporation for the purpose of furnishing gas to the inhabitants of the city of Sacramento at cheaper rates than were then prevailing there, and took stock therein, paying therefor less than its par value. They supposed that they could issue and dispose of the stock at such price as they might deem proper, and upon that understanding they took and paid for their respective shares at an agreed price, the average being about eight dollars per share. They expected to raise the sum of \$100,000, and the funds necessary to start the works, from the sale of stock, and did so. At the time the works should have been completed, as well as the time they were in fact completed, the stock had no market value. There was then, and had been for years, in existence and in operation an incorporated company called the Sacramento Gas Company, whose stockholders consisted of wealthy and influential citizens of Sacramento and San Francisco, so that when the new company commenced operations it at once encountered active competition. By reason of this competition the price of gas was reduced from time to time, and so reduced that both companies were losing largely. In conducting its business, the Citizens' Gas-light & Heat Company was compelled to expend large sums of money and incur large liabilities, in order to meet which it levied an assessment of \$1.50 upon each share of its capital stock. The assessment was made in good faith, for the purpose of paying the proper and legal expenses of the corporation, in the exercise of the best judgment of its board of directors, and under the advice of its counsel. The assessment was paid upon all of the stock by the holders thereof, except upon the stock of Morris. The assessment upon that was not paid. It was subsequently advertised for sale because of such non-payment, and at the appointed time, there being no other bid, it was bought in by the corporation.

In this condition of affairs, Morris came to the state of California, when the officers of the corporation offered to allow him to retake the stock so sold, upon his payment of the amount of the assessment thereon, and the amount of the advances made to him by the company; which offer was refused,—he saying the stock was not worth redeeming,—and after some unsuccessful efforts to adjust their differences he left the state and has never returned. Before the levy of the assessment, however, Albert Gallatin, on behalf and by authority of the Citizens' Gas-light & Heat Company, went to Philadelphia, and there endeavored to have Morris pay the company the amount of money advanced to him over and above the contract price, which the company claimed to be about \$46,000. This Morris declined to pay, but offered to pay \$30,000 in settlement. This was refused, so the attempted adjustment in Philadelphia failed, as did the subsequent one in California, already referred to. After Morris' departure from California, the competition between the Citizens' Gas-light & Heat Company and the Sacramento Gas Company continued, at heavy loss to both companies, until finally, in the year 1875, the two cor-

porations agreed to consolidate their interests. To effect such consolidation it was necessary that the Citizens' Gas-light & Heat Company should discharge all of its debts and liabilities. It was then indebted to the Savings & Loan Society, a corporation, in the sum of \$65,000, which sum was secured by a mortgage on the property of the Citizens' Gas-light & Heat Company. To pay this, as well as other indebtedness of the company, the 6,500 shares of the Morris stock, which was bought in by the company at the sale for the non-payment of the assessment thereon, was sold by the corporation at \$11 per share, as follows: To R. C. Clark, 200 shares; to A. Gallatin, 150 shares; to J. R. Watson, 155 shares; to C. H. Cummings, 200 shares; to E. H. Miller, Jr., 195 shares; to Mrs. L. Miller, 200 shares; to John Miller, 300 shares; to Frank Miller, 100 shares; to Leland Stanford, 1,250 shares; to Mark Hopkins, 1,250 shares; to C. Crocker, 1,250 shares; and to C. P. Huntington, 1,250 shares. The stock then had no market value, and the only inducement to the purchasers to buy, was the then proposed and contemplated consolidation of the two companies, without which the stock could not have been sold at any price, and Morris knew that such was the then condition of the stock.

The consolidation was subsequently effected by the organization of a new corporation called the Capital Gas Company, with a capital stock of \$2,000,000, divided into 40,000 shares, of the par value of \$50 each, one-half of which was to be issued to the stockholders of each of the old companies, in proportion to their respective interests therein, upon the conveyance to the new corporation by the old ones of all their property and effects, freed of incumbrances. This arrangement was carried out, and, because of the consolidation and the removal of competition, the stock of the new company attained a market value of from eight to eleven dollars per share; those being the extreme figures from the time of the consolidation until the commencement of the present action. The court below further found that Morris, although cognizant of all the facts, purposely refrained from the assertion of any right to the stock in question after the same was sold for non-payment of the assessment, and until after the consolidation of the old companies and the formation of the new, imparted to the stock of the latter some market value, when the present suit was commenced by the plaintiff, who is a clerk in the employ of Morris, and sues as his assignee. The court below further negatives all of the allegations of fraud contained in the bill.

The findings, in some respects, are earnestly challenged by appellant's counsel as being unsupported by the evidence; but, whatever might otherwise be held with respect to the findings in some particulars, there can be no doubt that the court below was justified in finding that Morris knew of the assessment of his stock, and its sale for non-payment of the assessment, and of the then condition and prospects of the company and its stock. If the assessment and sale

were invalid, he then had the right to commence proceedings to vacate the assessment and sale, and recover his stock. The reason he did not do so is manifest from the evidence as well as the findings. By reason of the formidable competition that existed to the business of the company, the stock had little or no value, and the prospects of the company were poor. All of this he knew. When, after the sale, the company offered to return him the stock upon his payment of the assessment and the amount of the company's advances to him; he refused, saying the stock was not worth redeeming. If he had the right to repudiate the sale of his stock upon the ground that it was not assessable, or for any other cause, was it not incumbent upon him to act with diligence? Could he acquiesce in the sale as long as the stock of the company was of but little value, but when, by the exertions of others, the consolidation of the company with a rival one imparted to the stock of the combined properties more value, come into a court of equity and claim an equivalent of the stock of the new company? We think not.

In the case of *Hayward v. National Bank*, 96 U. S. 611, certain mining stocks, deposited by Hayward with the bank as collateral for a loan, were sold by the bank to three of the bank directors, but at a price above the market rate, and for a sum sufficient to pay the loan. Hayward was informed of the sale at the time and did not object. Subsequently the stock greatly enhanced in value, and then—about three years and a half having elapsed—Hayward filed a bill against the bank, asserting a right to redeem the stock, and praying for general relief. The court held that he was entitled to no relief; saying, at the end of the opinion:

"If Hayward was defrauded of his stock; if the title did not pass from him or the bank because of the peculiar relations which the purchasers held to him and the property; if he had the right originally, upon any ground, to repudiate the sale and reclaim the stock,—it was incumbent upon him, by every consideration of fairness, to act with diligence, and before any material change in the circumstances and in the value of the stock had intervened. No sufficient reason is given for the delay in suing. His poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights. He must be deemed to have made a final election not to disturb the sale of 1868; and a court of equity should not permit him, under the circumstances, to recall that election. Upon the grounds, then, both of acquiescence and lapse of time, he should be held to have forfeited all right to relief in a court of equity."

The court further held that—

"The question of acquiescence or delay may often be controlled by the nature of the property which is the subject of litigation. 'A delay which might have been of no consequence in an ordinary case, may be amply sufficient to bar relief when the property is of a speculative character, or is subject to contingencies, or where the rights and liabilities of others have been in the mean time varied. If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should

prove to his advantage;" citing Kerr, *Fraud & M.* (Bump's Ed.) 302, 306; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587.

These principles we think decisive of the case against the appellant. It becomes, therefore, unnecessary to decide other questions discussed by counsel.

Judgment and order affirmed.

We concur in the judgment: McKINSTRY, J.; McKEE, J.

(67 Cal. 133)

WALLACE, Adm'r, v. CENTER. (No. 8,929.)

Filed June 23, 1885.

ACTION—DISMISSAL AFTER DEATH FOR WANT OF PROSECUTION.

The dismissal of an action for want of prosecution, though made after the death of a plaintiff, is not void, even if no substitution of personal representatives has been made.

Department 1. Appeal from superior court of the city and county of San Francisco.

Wilson & Wilson, for appellants.

E. Kirkpatrick, for respondent.

Ross, J. It appears from the record that on the nineteenth of July, 1865, Elizabeth Perkins commenced an action against the defendants. Years passed, and finally, on the eighteenth of September, 1876, the cause was regularly called for trial in the late Fourth district court, and, no one appearing on the part of the plaintiff, the defendants, by their counsel, moved the court to dismiss the action for want of prosecution, and judgment of dismissal was accordingly entered and recorded on the nineteenth of October, 1876. Term after term of the district court passed, and no motion of any character was made in the case. The statutory time of one year allowed for appeal from the judgment elapsed without appeal; the court itself went out of existence with the year 1879, and was succeeded by the superior court created by the new constitution, and to that court there was presented, on the first of August, 1882, an affidavit stating that Elizabeth Perkins died on the third day of November, 1875, prior to the judgment of dismissal, and upon that affidavit, and the suggestion of the death of Elizabeth Perkins, an order was made by the superior court, substituting James Wallace, administrator of the estate of Elizabeth Perkins, as plaintiff in the case. And subsequently, upon notice given to the former counsel of the defendants, and based upon the affidavit showing the death of the original plaintiff, the superior court made an order vacating and setting aside the judgment of dismissal. The appeal is from that order.

It is entirely clear that the order can only be sustained upon the theory that the judgment of dismissal was absolutely void; and that it was not so is shown by the recent case, entitled *Phelan v. Tyler*,

64 Cal. 80. The right to attack the judgment for "irregularities" was long since lost by lapse of time.

Order reversed.

We concur: McKEE, J.; McKINSTRY, J.

(67 Cal. 130)

MARINI v. GRAHAM. (No. 8,718.)

Filed June 23, 1885.

1. PUBLIC NUISANCE—OBSTRUCTION OF STREETS.

A private individual who suffers injury or annoyance, of the same kind as that sustained by the public, by an obstruction in a street, which is a public nuisance, receives no special injury for which, in law, he is entitled to a private action, or in equity to a writ of injunction, or in a special proceeding to a writ of mandate.

2. SAME—LEGALIZED OBSTRUCTION IN STREET IS NOT.

An obstruction in a sidewalk of a street, if authorized by the board of supervisors, is not a nuisance.

Department 1. Appeal from superior court of the city and county of San Francisco.

John T. Humphreys and Wellington C. Burnett, for appellants.

Aug. D. Splivalo and Wm. H. Mott, for respondents.

McKEE, J. This is an application for a writ of mandate. It appears from the record in the case that section 7 of order No. 1,588 of the general orders of the board of supervisors of the city and county of San Francisco provides:

"No person owning or having the control of any building shall maintain any approach or entrance thereto from the sidewalk except in accordance with the following provisions:

"1. No entrance, which shall be a descent from the sidewalk, shall occupy more than three-tenths of the width of the sidewalk, nor more than four feet thereof. * * *

"2. No approach to a building which shall be an ascent from the sidewalk shall occupy more than three-tenths of the width of the sidewalk, nor more than four feet thereof, nor be more than five feet in height, and shall be protected by balusters and railings, built to the satisfaction of the superintendent of public streets, highways, and squares."

Dupont street, between Union and Filbert streets, in said city and county, has a sidewalk 10 feet wide. Ascending from the sidewalk to a building, Nos. 1505 and 1507, fronting on the street, there is an approach and entrance consisting of a flight of steps seven feet and eight inches high, which occupies three feet and five inches of the sidewalk. This approach having been, as alleged, maintained by the owner of the building in violation of the ordinance, demand was made upon the superintendent of public streets and highways of the city and county to "cause and compel the said approach to be maintained and constructed in accordance with the provisions of the ordinance." This he refused to do; and, it is alleged, "his refusals have annoyed and greatly injured the petitioner," who is the owner of adjacent

buildings on the same street, "and other property owners in the neighborhood." For that reason, and "because the matters involved are of public and general interest to the people of the said county, and more particularly to your affiant, who is beneficially interested herein," and "because the maintenance and continuance of the approach heretofore complained of, and in violation of law, will work serious mischief and irreparable injury to affiant," he asks for a peremptory writ of mandate to compel the superintendent to remove the illegal entrance, as a duty especially enjoined upon him by law.

Upon the issuance of an alternative writ, the superintendent appeared and demurred to the sufficiency of the petition, and answered that the petitioner was not entitled to the writ, because there was a plain, speedy, and adequate remedy for the removal of the objectionable entrance, provided by the ordinance itself and by the general law; and because the entrance had been legalized and suffered to continue by resolution and order No. 15,814 of the board of supervisors, passed July 18, 1882, etc.

The court held that the return was insufficient, and that the petitioner was the party beneficially interested, and entitled to a peremptory writ. In this there was legal error. The sidewalks of a public street of a city are parts of the street. Any obstruction of the sidewalk is therefore an obstruction of the street and a nuisance; but it is a public nuisance, because it interferes with the free use of the street by the traveling public in general, and not merely some particular person. It is, therefore, an offense against the public, which is remediable by the public only, and not actionable, except where an individual has suffered some special damage beyond what is common to himself with the rest of the public. In modern practice, *mandamus* is regarded as an action by the party who applies for it, under the provisions of the Code, to enforce a private right when the law affords him no other adequate remedy. In his application he must show that he is the party beneficially interested in the right asserted, and that there is a corresponding obligation on the part of the officer to do the act required of him. If the private right on the one hand or the obligation on the other be doubtful, the court will not interfere. *Arberry v. Beavers*, 6 Tex. 457; *State v. Commissioners*, etc. 11 Kan. 69. Assuming, therefore, that the obstruction of the sidewalk is a nuisance, and that the law imposed upon the superintendent of streets the obligation to abate or remove it, we think the petitioner is not entitled to *mandamus* for that purpose, because, upon the facts stated in his petition, he does not present a case within the exception to the rule that a private action cannot be maintained for a public injury. The facts upon which he relies as the basis of his action to enforce an alleged private right in himself, affirmatively show that the obstruction in the sidewalk, of which he complains, is not more injurious to him than it is to the inhabitants at large. Any injury or annoyance which he suffers from it may be greater in degree, but it is not

different in kind, from that sustained by the public; therefore, he receives from it no special injury for which he is entitled in law to a private action, (*Hopkins v. Western Pac. R. Co.* 50 Cal. 194; *Bigley v. Nunan*, 53 Cal. 403;) or in equity to a writ of injunction, (*Payne v. McKinley*, 54 Cal. 532;) or in a special proceeding to a writ of mandate, (*Linden v. Board Sup'rs*, 45 Cal. 6; *Harpending v. Haight*, 39 Cal. 189.) Besides, as the alleged obstruction was legalized by the board of supervisors, it was not the duty of the superintendent to remove it. A legalized obstruction in a sidewalk of a street loses its character as a nuisance.

Judgment reversed, and cause remanded for further proceedings.

We concur: McKINSTRY, J.; ROSS, J.

(67 Cal. 125)

CHENEY v. NEWBERRY and others. (No. 9,744.)

Filed June 23, 1885.

LEASE—ENTRY UNDER CONTRACT FOR RENT—CANCELLATION OF CONTRACT.

When parties enter into a written contract for a lease for a stated term, and at a stated rent, an entry thereunder, and payment and receipt of the rent thereunder, constitute a valid lease, for the term and at the rent specified, and neither party can subsequently cancel the contract without consent of the other.

Department 1. Appeal from superior court of the county of San Bernardino.

H. M. Willis, for appellant.

Satterwhite & Curtis, for respondents.

ROSS, J. The demurrer to the complaint was properly sustained. The complaint alleges that on the first of June, 1883, under a written contract for a lease of a certain lot of land for the term of three years at a rental of \$66.66 per month, payable in advance, the defendants entered into possession of the premises; that on the twenty-seventh of September, 1883, being still in possession, defendants notified plaintiff "that they rescinded and canceled the contract for a lease aforesaid, and refused to be bound by it." That defendants continued to occupy the premises, "and plaintiff elected to receive from them for the year ending June 1, 1884, the rent therefor, at the rate of \$66.66 per month." Unless, in this condition of affairs, it can be said that defendants were not holding the premises under the contract under which they originally entered, it is quite clear that the action, which is unlawful detainer, cannot be maintained upon the averments contained in the complaint. The entry under the written contract for a lease for a stated term and at a stated rent, and the payment and receipt of the rent, constituted a valid lease between the parties for the term, and at the rental specified. 1 Washb. Real Prop. 397, 398. Neither party could subsequently cancel the contract without the consent of the other, and that the plaintiff did not consent to the pro-

posed cancellation is manifest from his subsequent acceptance of the rent in accordance with the terms of the contract. Payment and receipt of the rent was only consistent with a recognition by lessor as well as lessee that the lease was in force.

Judgment affirmed.

We concur: McKee, J.; McKinstry, J.

(67 Cal. 126)

CHENEY v. NEWBERRY and others. (No. 9,752.)

Filed June 23, 1885.

PARTNERSHIP—FAILURE TO FILE CERTIFICATE—EFFECT OF.

The assignment of a valid claim held by persons as partners is not prevented nor affected by the failure of such partnership to file and publish the certificate required by the statute, which prohibits partners doing business under a fictitious name from maintaining an action on a contract made in the partnership name until they have filed and published such certificate. Civil Code Cal.

Department 1. Appeal from superior court of the county of San Bernardino.

Satterwhite & Curtis, for appellants.

H. M. Willis, for respondent.

Ross, J. Appellants contend that the provision of the Civil Code, to the effect that persons doing business as partners, contrary to the provisions of the article requiring the filing and publishing of a certificate showing the names and residence of all of the members of the partnership, "shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name," also preclude such persons from assigning a valid claim held by them as partners. There is nothing to the point.

Judgment affirmed, with 10 per cent. damages.

We concur: McKinstry, J.; McKee, J.

(67 Cal. 166)

PEOPLE v. POTRERO & B. V. R. Co. (No. 8,950.)

Filed June 24, 1885.

1. RAILROAD—RIGHT OF WAY ACROSS NAVIGABLE STREAM.

Where a legislative grant of a right of way to a railroad prescribes a route which crosses a navigable stream, such grant necessarily includes the right to build a bridge over such a stream.

2. NAVIGABLE STREAMS—POWER OF STATE OVER.

The power of the state over navigable streams is plenary until congress acts on the subject, and then the power of the state is subordinate to that of congress.

3. SAME—CONSTRUCTION OF ACT ADMITTING CALIFORNIA INTO THE UNION.

The power of the state to authorize the construction of a bridge over a navigable stream within its boundaries, is not impaired by the provision of the act of congress admitting California into the Union, to the effect "that all the navigable waters within the state shall be common highways and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor."

Department 1. Appeal from the superior court of the city and county of San Francisco.

McAllister & Bergin, for appellant.

W. W. Morrow, for respondent.

Ross, J. Action to abate an alleged nuisance consisting of the maintenance by defendant of a bridge across Islais creek, in the city and county of San Francisco, which impedes the navigation of the creek; the waters thereof being navigable. The defendant claims the right to maintain the bridge under a grant by the legislature made April 2, 1866, to one Tompkins, his associates and assigns, of the right to lay down, maintain, and operate a street railroad along a certain route, and upon certain terms stated in the act, which is found in St. 1865-66, p. 749. The route designated crosses Islais creek, and as the road could not be built across the creek without a bridge, the grant of the right to build the road necessarily included a grant of the right to build the necessary bridge. *Union Pac. R. Co. v. Hall*, 91 U. S. 350. And that such was the understanding of the legislature is shown by the subsequent act of March 28, 1868, (St. 1867-68, p. 475,) amending the act of April 2, 1866; for the fifth section of the amendatory act provides, among other things, that the company "shall be required to construct a draw in the bridge on Kentucky street, at its intersection with Tulare street, whenever the parties interested shall pay the expense of constructing such draw, and provide for maintaining the same." And a similar provision is inserted in the act of the legislature, passed March 26, 1868, (St. 1867-68, p. 356,) declaring Islais creek a navigable stream; the third section of which providing, among other things, that "nothing in this act shall be so construed as to affect the rights or franchise of the Potrero & Bay View Railroad Company, (which company succeeded on July 23, 1867, to all the rights of Tompkins and his associates,) or to require said company to make a draw on said bridge, unless the cost of said draw, and the expense of maintaining the same, are provided by the interested parties who may desire such improvement."

If the state had the constitutional power to authorize the building of the bridge in question, it would seem clear enough that action under its sanction cannot legally be adjudged a nuisance. But the ground chiefly relied on by counsel, and upon which the court below seems to have held against the defendant, is that the act of the legislature granting the right is unconstitutional and void, because of that provision of the act of congress admitting California into the Union which provides "that all the navigable waters within the state shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor." 9 U. S. St. 452, 453. But this point is disposed of by the supreme court of the United States against the plaintiff, in the recent case of *Cardwell v. American River Bridge Co.* 5 Sup. Ct. Rep. 423, in which it was held that the clause referred

to in no way impaired the power which the state could exercise over the subject if the clause had no existence, but that its object was to insure a highway equally open to all, without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation; and that the clause contemplated no other restriction upon the power of the state in authorizing the construction of bridges over them, whenever such construction would promote the convenience of the public. The act admitting California declares that she is "admitted into the Union on an equal footing with the original states *in all respects whatever*." She was not, therefore, shorn by the clause as to the navigable waters within her limits of any of the powers which the original states possessed over such waters within their limits. And the court reiterated what had before been held in many cases, that, while the power of the state with respect to the construction, regulation, and control of bridges over navigable streams is subordinate to that of congress, still, until congress acts on the subject, the power of the state is plenary. The *Case of Cardwell* and others, to which reference is there made, is decisive of the point.

Judgment and order reversed, and cause remanded.

We concur: McKEE, J.; McKINSTRY, J.

(68 Cal. 171)

BROWN, Adm'r, v. CENTRAL PAC. R. CO. (No. 8,682.)

Filed June 24, 1885.

RAILROAD CORPORATIONS—NEGLIGENCE OF CO-EMPLOYEES.

A railroad corporation is not liable for an injury caused to a locomotive engineer by the negligence of a switch-tender, as they are co-employees engaged in the same general business.

Department 1. Appeal from superior court of the city and county of San Francisco.

Henry E. Highton, for appellant.

W. H. L. Barnes, for respondent.

McKEE, J. Upon a general demurrer to the complaint in this case the defendant had judgment, from which the plaintiff has appealed. The cause of action stated in the complaint is this: In the month of September, 1880, W. C. Brown, an engineer of the Central Pacific Railroad Company, while driving one of its locomotives attached to a train of passenger cars over and upon a narrow strip of land and trestle-work known as the "Oakland Pier," which extended into the San Francisco bay and formed part of the company's road from Sacramento to Oakland, was precipitated with the locomotive into the bay and drowned, in consequence of the negligent and improper conduct of the defendant in giving to the engineer the wrong signal, *i. e.*, in giving him the signal to go on instead of a signal to stop.

In considering the sufficiency of the statement to constitute a cause of action, the court below was bound, as is this court, to presume from the allegations of the complaint that the act of negligence which caused the engineer's death was committed by some one employed by the company whose duty it was to signal and set switches for its trains,—for a railroad corporation can only act by its agents or servants,—so that, whether the death of the engineer resulted from the negligence of the switch-tender of the corporation, or, as suggested in argument by plaintiff's counsel, from the negligence of the superintendent or a director or other agent of the corporation in charge of that duty, he was an employe of the corporation, and as the engineer was also an employe the corporation was not liable under the Code for the death of the engineer resulting from the negligence of the co-employe, unless the employes were not employed in the same general business, or the corporation neglected to use ordinary care in the selection of the culpable employe, or in providing him with proper machinery for use. Section 1970, Civil Code.

There is no allegation that the officer, whoever he was, was not properly qualified, competent, and skillful to perform his duty; nor that the instrumentalities furnished by the corporation for the performance of his duty were defective; therefore the corporation performed its duty in that regard, and the single question remains whether the engineer and switch-tender were co-employes in the same general business. We think they were.

"The business of a railroad company," says Chief Justice SHAW in *Farwell v. Boston & W. R. Corp.* 4 Metc. 55, "is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. * * * Persons employed by the company are appointed and employed to perform separate duties and services, all tending to the accomplishment of one and the same purpose—that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance." In that case it was held that the engineer and the switch-tender of the company were fellow-employes in the same line of employment. The rule for determining the question involved is thus formulated by the supreme court of Illinois: "Where the facts show that the employes were brought into personal consociation by their ordinary duties, or that at the time of the injury they were co-operating in some particular work, in such cases they must be regarded in law as fellow-servants." *Chicago & N. R. Co. v. Moranda*, 93 Ill. 324.

Upon the same principle this court has held that the "helper" at a foundry, and a driver of a truck-wagon belonging to the foundry, under the same employer, and the superintendent or foreman of a mine, and a laborer at the mine, were "fellow-servants" engaged in the same general business. *Hogan v. Central Pac. R. Co.* 49 Cal. 128; *Collier v. Steinhart*, 51 Cal. 116; *McLean v. Blue Point Gravel Co.* Id.

256. "The term 'fellow-servants' includes all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it." Wood, Mast. & Serv. § 435; *McLean's Case*, *supra*.

But it does not include the servants of an employe in any such grades or departments. As, for instance, if a corporation employs an agent to perform duties of any particular grade, or in any special department, with power to employ, control, and discharge workmen or laborers under him, he is not a "fellow-employe" of those whom he employs, and for injuries to any of them caused by his negligence the corporation is liable. *Beeson v. Green Mountain G. M. Co.* 57 Cal. 20; *McKinne v. California S. R. Co.* 5 PAC. REP. 482. This case does not fall within that exception; the engineer and the switch-tender, although on duty in separate departments, were, in the discharge of their duties, under the same general employment, and for the negligence of the fellow-servant of the intestate the defendant is not liable. *Ycomans v. Contra Costa Co.* 44 Cal. 71; *Hogan v. Central Pac. R. Co.*, *supra*; *Slater v. Jewett*, 85 N. Y. 62.

There was no error in sustaining the demurrer to the complaint. Judgment affirmed.

We concur in the judgment: MCKINSTRY, J.; ROSS, J.

(67 Cal. 165)

LITTLE v. JACKS. (No. 9,823.)

Filed June 24, 1885.

NEW TRIAL—AMENDMENT OF NOTICE.

A notice of intention to move for the vacation and setting aside of a judgment is not a notice of intention to move for a new trial, and cannot, after the time limited for giving the latter notice, be amended so as to become and have the effect of a notice of intention to move for a new trial.

Department 1. Appeal from superior court of the county of Monterey.

D. M. Delmas, for appellant.

S. O. Houghton, for respondent.

Ross, J. It appears from the bill of exceptions in this cause that on January 9, 1884, the court made and filed its written findings of fact and conclusions of law, and entered its judgment thereon, of which defendant had due notice on the same day. Within 10 days thereafter defendant gave plaintiff notice of his intention to move the court to vacate and set aside the judgment. This was not a notice of intention to move for a new trial. *Sawyer v. Sargent*, 3 PAC. REP. 872; *Martin v. Matfield*, 49 Cal. 42. The time allowed by statute for the giving of a notice of the latter character expired with the tenth day after the notice of the decision was given. To allow a notice filed within statutory time, but which was radically defective, to be

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amended after the expiration of that time, would be, in effect, to extend the time allowed by statute for the giving of such notices, which the courts have no power to do.

Order reversed.

We concur: MCKINSTRY, J.; MCKEE, J.

(87 Cal. 171)

BUXTON v. TRAVER and others. (No. 9,809.)

Filed June 25, 1885.

UNSURVEYED PUBLIC LANDS—OCCUPATION—RIGHT OF HEIRS OF DECEASED OCCUPANT.

The occupation of unsurveyed United States lands, without taking any of the steps required by the pre-emption laws, gives to the occupant merely the privilege of pre-emption, and is neither a legal nor an equitable title; nor is there any existing claim of the settler to pre-empt which can be completed by his heirs or administrator, nor have the latter, in such case, any equitable right to control the patent to such land subsequently issued on the entry of another.

Department 1. Appeal from superior court of the county of San Bernardino.

John H. Dickinson, for appellants.

Curtis & Otis, for respondents.

MCKEE, J. Appeal from a judgment of dismissal entered on sustaining a general demurrer to the complaint. The complaint shows that the plaintiffs are daughters, and the defendant Hattie Traver the widow, of Oscar Traver, deceased; that Oscar Traver died in the year 1877, in possession of the tract of land described in the complaint, leaving surviving him the said widow and two daughters as his sole heirs at law; that after his death the widow continued to reside on the land, and in November, 1879, she made a homestead entry upon it, and on the tenth of November, 1879, obtained for it a patent from the United States. This patent, the plaintiffs claim, inures to the benefit of the heirs at law of the deceased; and the object of the suit in hand is to have the widow, as the recipient of the United States patent, declared their trustee of an undivided one-half interest in the land, and of the rents, issues, and profits of the same. They base this claim upon section 2269, U. S. Rev. St., which is as follows:

"Where a party entitled to claim the benefits of the pre-emption law dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned."

Of the validity of this statute there is no question. *Elliott v. Figg*, 59 Cal. 117. But it has no reference to an entry made under the homestead laws of the United States; it refers only to an entry made in consummation of a claim of right to land, asserted, under the pre-

emption laws of the United States, by a pre-emptor, who dies before completing his claim by filing the requisite papers. In such a case, the statute extends the right, after the death of the pre-emptor, to his executor or administrator, or any of his heirs at law, to complete the claim initiated by him, by filing the papers necessary for the purpose, and to enter the land for the benefit of all the heirs. But the complaint contains no case under the statute. Its statement of facts shows that the land patented to the defendant, Hattie, was, in the year 1870, part of the unsurveyed public land of the United States, open to pre-emption; that Oscar Traver settled upon it that year, with the intention of acquiring title thereto from the United States as soon as he could; that he was a duly-qualified pre-emptor, and, in that capacity, resided on the land with his family, consisting of the plaintiffs and the defendant, Hattie, until his death, in 1877; that he died without leaving a last will, and there was no administration of his estate; and it appears that neither the widow nor the plaintiffs, nor either of them, after his death, suggested or presented any claim initiated by him, or filed any papers for the purpose of completing such a claim, if it existed, or took any steps for the entry of the land, under the pre-emption laws, for the benefit of the heirs. It is alleged, however, that the widow continued to occupy the land after his death; and it is charged that it was her duty to complete the pre-emption of the deceased, and enter the land for the benefit of the heirs; that she did not perform that duty, but, instead, fraudulently communicated to the plaintiffs, as fact, that their father died without leaving any property, and thus prevented them from establishing their father's claim by the requisite proof, and then entered the land in her own name and for her own behoof.

There is no averment in the complaint that the fact communicated to the plaintiffs was not true, and it is admitted that the approved plat of the township, on which the land is situated, was not filed until the first of July, 1879,—more than two years after the death of Oscar Traver. At the time of his death, Traver was, therefore, a mere occupant of the land as a portion of the unsurveyed public land of the United States, for the pre-emption of which he had taken no steps required by the pre-emption law. In that position he had a mere privilege of pre-emption; but such a privilege is not a title legal or equitable; it is only a proffer to a certain class of persons that they may become purchasers if they will; but without payment, or an offer to pay, it confers no equity. A right is conferred by it only when the party has accepted the offer by claiming the benefit of the statute in the proper manner and within the required time, or by payment. *Grand Gulf R. & B. Co. v. Bryan*, 8 Smedes & M. 268; *Hutton v. Frishie*, 37 Cal. 475; *Frishie v. Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77. Until there is an offer to do what the pre-emption laws require to be done to initiate and prosecute a pre-emption right, there is no existing claim of the settler to pre-empt, which can

be completed after his death by his heirs or his administrator; and as no such claim was initiated and prosecuted by him in his life-time, he acquired no proprietary interest in the land which, upon his death, would descend to his heirs and clothe them with an equitable right to control the patent to the land subsequently issued by the United States upon an entry made by another. As, therefore, the original settler died without making any claim to the benefits of the pre-emption laws which could be perfected by his heirs, and as no equitable right in the land descended to the heirs, the patent issued to the defendant, Hattie, upon her entry under the homestead laws, is not subject to a trust in favor of the plaintiffs, (*Jarvis v. Hoffman*, 43 Cal. 314,) and the court did not err in sustaining the demurrer, and entering judgment for defendants.

Judgment affirmed

We concur: Ross, J.; McKINSTRY, J.

(67 Cal. 169)

WEST v. MASSON. (No. 8,524.)

Filed June 25, 1885.

VENDOR AND VENDEE—WARRANTY DEED—BREACH OF COVENANTS.

Where defendant conveyed to plaintiff by a deed of warranty, the covenants in the deed are not broken by the act of the defendant's grantor in claiming that his deed was intended merely as a mortgage, and bringing an action against the plaintiff and defendant to redeem the same, where the plaintiff defended such action successfully.

Department 1. Appeal from superior court of the city and county of San Francisco.

M. G. Cobb, for appellant.

Loughborough & Newhall, for respondent.

MCKEE, J. On the thirteenth of May, 1877, the defendants, Francis P. and Victor B. Masson, sold, and by a deed of grant, bargain, and sale conveyed, to the plaintiff, Louis West, a tract of land in Alameda county. Additional to the covenant implied from the terms "grant, bargain, and sale," the deed contained a covenant on the part of the grantors "to warrant and defend the premises against all persons lawfully claiming the same by, through, or under them, or either of them." When West acquired title from the defendants, he was in possession of a small portion of the tract as tenant of one William Schuman, from whom the defendants derived title, subject to the lease to West, and Schuman occupied the balance of the land. West knew when he purchased from the defendants, and before paying the purchase money and receiving his deed, that Schuman was in possession, nominally, as a tenant at will of the Massons, but claiming that the deed by which he had transferred the title to them, though absolute in form, was intended as a mortgage to secure payment of a certain mortgage on the land in favor of the Massons, and for the

foreclosure of which there was, at the time of the execution of the deed by Schuman to them, an action pending in their favor against Schuman, West, and others. Under these circumstances, West purchased from the defendants, and received and had recorded his deed.

Soon after the deed to West was recorded, Schuman tendered to the Massons money to redeem the land from what he claimed to be a mortgage to them, and demanded a reconveyance of the premises. They refused to accept the tender or to comply with the demand. A suit in equity was thereupon commenced by Schuman against the Massons and West, their grantee, to have the deed to the former declared a mortgage, and to compel the defendants in the action to reconvey the premises upon payment of what was due. West notified his co-defendants in the action to defend the suit, but they refused, and he had to defend it at his own expense, and afterwards, at his own cost and expense, had to commence and prosecute an action of ejectment against Schuman to recover possession of the land. In both actions he was successful, and the object of the action in hand is to recover from the defendants the money expended by him in recovering from Schuman possession of the land which he purchased from them. For this, he contends, they are liable upon the covenants in the deed. But we think there was no breach of either the express or implied covenant in the deed to the plaintiff. Schuman did not claim a paramount title to the land adverse to the defendants, as his grantees, nor a title "by, through, or under them, or either of them." He was in possession under them, asserting that the conveyance of the land which he had made to them, and under which they claimed to have derived their title from him, was a mortgage, from which he had the right to redeem the land. The assertion of such a claim was not a breach of the defendants' covenant of warranty to the plaintiff. The plaintiff purchased with full knowledge of the claim, and took a conveyance of the land subject to it. Any expenditures of money made in resisting it were, therefore, in defense of his own right, and no liability attached to the defendants by reason of their covenants in the conveyance to pay him therefor.

Judgment and order affirmed.

We concur: Ross, J.; McKINSTRY, J.

(2 Cal. Unrep. 489)

HOGAN v. TYLER. (No. 8,744.)

Filed June 24, 1885.

1. VERDICT—REVERSAL FOR INSUFFICIENCY OF EVIDENCE.

Where evidence is conflicting, the court will not interfere with the verdict, on appeal, on the ground of insufficiency of the evidence.

2. IMMATERIAL EVIDENCE—EXCLUSION NOT ERROR.

A reversal is not warranted, on appeal, by the exclusion of evidence on the ground of immateriality, if the materiality of the evidence offered is not apparent.

Department 2. Appeal from superior court of the city and county of San Francisco.

George W. Tyler, for appellant.

Pillsbury & Titus, for respondent.

THORNTON, J. As to the insufficiency of the evidence to justify the verdict, it only needs to be said that the evidence is conflicting, and, under such circumstances, this court will not interfere with such verdict on appeal. The parol evidence of the plaintiff did not tend to contradict, add to, or vary the written contract entered into between the parties to this action. The oral evidence referred to a different agreement, which was never reduced to writing. Under such circumstances, the rule which excludes parol evidence on the ground that it will contradict, add to, or vary an agreement in writing does not apply. 1 Greenl. Ev. §§ 284a, 303.

The defendant, on the cross-examination of plaintiff, put to him the following question: "Now, before you delivered these papers—this note and the policies of insurance—to Judge TYLER, did you have any conversation with Mrs. Hedge on the subject?" The question was objected to by the plaintiff as immaterial; that any conversation with Mrs. Hedge was immaterial, as she was not a party to the action. The objection was sustained and defendant excepted. Why this question was asked was not explained. No statement was made to show how the answer to it could be in any way material to any issue involved in the cause. Under these circumstances we can see no error in the ruling of the court.

The plaintiff by his counsel asked defendant whether he was aware of certain evidence given by one Fred. Hedge at the time he (defendant) dismissed an action concerning which testimony had been offered in the case. Defendant objected to the question on the ground that it referred to a deposition which was given in another case, and which had not been offered in evidence herein. The objection was overruled and defendant excepted. The witness answered that he was aware that Hedge had made a deposition, which was in writing; that he had read it; but that he would not state the contents of it unless he was compelled to do so by the court. He at the same time stated that he did not think counsel correctly stated the contents of the deposition. This was substantially all that occurred in relation to the question and answer that is material. The witness was not asked to state the con-

tents of the deposition. The inquiry extended only to his own knowledge of the evidence given by Hedge (which evidence was embodied in the question) at the time he dismissed the suit referred to. This he answered. We see no error in the ruling of the court. The contents of the deposition were not asked for, nor were they testified to. We cannot see in what manner defendant was prejudiced by a question whether at a time mentioned in it he was aware of the matters stated in the question. The above disposes of all the points made on behalf of appellant.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MYRICK, J.

(67 Cal. 174)

SALLEE v. CORDER. (No. 9,937.)

Filed June 26, 1885.

DESERT LANDS—RIGHT OF PROPOSED PURCHASER TO POSSESSION.

Desert land, duly entered as such, and paid for, under the act "to provide for the sale of desert lands," at the rate of 25 cents per acre, is reserved from entry under other laws relative to public lands, and gives to the proposed purchaser the right of possession for three years; and, in an action by him to recover the possession of the same, the fact that after the commencement of such action the defendant claimed the land as a pre-emptor will constitute no defense to the action.

Department 1. Appeal from superior court of the county of San Bernardino.

Hight & Fording, for appellant.

J. D. Benthune and Will A. Harris, for respondent.

By THE COURT. The case shows that the section of land, part of which is demanded in this action, was "duly entered by plaintiff as desert land on the fifteenth of April, 1882, and twenty-five cents per acre paid thereon by plaintiff to the United States government for each and every acre of said section." Land thus entered, under the act "to provide for the sale of desert lands," etc., (Supp. Rev. St. U. S. 1874-1881, p. 289, c. 107,) is reserved from entry under other laws, and gives the right of possession for three years to the proposed purchaser. The plaintiff herein was therefore entitled to recover. The fact that defendant, after the commencement of this action, claimed (as appears from a memorandum upon the books of the "United States land-office at Los Angeles") a portion of the land as a pre-emptor, constituted no defense.

Judgment reversed, and cause remanded for a new trial.

(67 Cal. 185)

SHARON v. SHARON. (No. 9,984.)

Filed June 29, 1885.

1. DIVORCE—JURISDICTION OF SUPREME COURT OVER.

An action of divorce being in the nature of a case in equity, is within the appellate jurisdiction of the supreme court under the California constitution of 1879.

2. MARRIAGE—JUDGMENT IN ACTION TO DETERMINE VALIDITY, APPEALABLE.

An action to determine the validity of a marriage is in the nature of a case in equity, and an appeal lies from a judgment rendered therein to the supreme court.

3. DIVORCE—ALIMONY—ORDER FOR, APPEALABLE.

An appeal lies to the supreme court from an order in an action of divorce, for the payment of alimony and counsel fees, such order being in the nature of a final judgment, and such order cannot be reviewed on appeal from the judgment decreeing a divorce.

McKEE, J., dissenting.

In Bank. Appeal from superior court of the city and county of San Francisco.

W. H. L. Barnes, O. P. Evans, and Stewart & Herrin, for appellant.

Tyler & Tyler, D. S. Terry, George Flournoy, and Walter Levy, for respondent.

SHARPSTEIN, J. The order to show cause why all proceedings upon the order of the court below for the payment of alimony and counsel fees should not be stayed, pending the appeals from the order and judgment, and the motions to have said appeals dismissed, devolve upon us the consideration and determination of the following questions: (1) Has this court appellate jurisdiction in actions of divorce? (2) Can the order for the payment of alimony and counsel fees be reviewed on an appeal from the judgment? (3) Can this court entertain jurisdiction of the direct appeal from that order?

Although this court has, during a period almost coeval with its existence, heard and determined appeals in divorce cases, its jurisdiction to do so has not until now been sharply challenged. In *Conant v. Conant*, 10 Cal. 250, the appellate jurisdiction was disputed only in cases in which no question of property was involved. With that exception the complete appellate jurisdiction of this court in such cases appears to have been uniformly acquiesced in.

The first constitution conferred appellate jurisdiction on this court in all cases in which the matter in dispute exceeded \$200; the next, "in all cases in equity;" and the present constitution likewise confers appellate jurisdiction on this court "in all cases in equity." Appellate jurisdiction in other enumerated cases was and is conferred, but the jurisdiction of this court of an action of divorce, in our opinion, depends on its being, in this state, at least, a case "in equity." The first constitution prohibited the granting of divorces by the legislature, but did not confer the power to grant them on any court, unless the conferring of "jurisdiction in law and equity in all civil cases," on the district courts, conferred it on those courts. And in the earliest reported case of divorce to which our attention has been directed,

the first pleading on the part of the plaintiff is denominatad, in the opinion of the court, "a bill filed for a divorce." *Kashaw v. Kashaw*, 3 Cal. 312. And in *Fuller v. Fuller*, 17 Cal. 605, the court denominates the complaint "a bill for divorce." There was then, as now, but one form of civil actions in this state, and the first pleading on the part of the plaintiff was then, as now, "a complaint." In equity cases, however, but in none other, so far as we are advised, the courts of this state sometimes, and not infrequently, refer to the first pleading on the part of the plaintiff as "a bill." Under the first constitution, as before stated, the appellate jurisdiction of this court embraced all cases, when the matter in dispute exceeded \$200. No distinction was made between cases in equity and at law. But in *Conant v. Conant*, 10 Cal. 249, this was construed to mean, what is clearly expressed in subsequent constitutions, viz., "appellate jurisdiction in all cases in equity," and in certain enumerated cases at law. The court, FIELD, J., delivering the opinion, said: "It never could have been the intention of the framers of the constitution to deny to the higher courts both original and appellate jurisdiction in that large class of cases where the relief sought is not susceptible of pecuniary estimation."

In *Lyons v. Lyons*, 18 Cal. 447, the court filed no findings of fact or conclusions of law, and it was contended by the appellant's counsel that it constituted a sufficient ground for the reversal of the judgment. But this court, COPE, J., delivering the opinion, said: "*This is a suit in equity*, and the only error assigned is that there are no findings to support the judgment." He then cites *Walker v. Sedgwick*, 5 Cal. 192, in which it was held that the statute which required findings to be filed did not apply to cases in equity. These cases all arose and were decided before any change had been made in the original constitution. And when revised it clearly expressed what it had before been construed to mean. From the time of that revision down to the date of the adoption of the present constitution this court entertained appeals in divorce cases, and its jurisdiction to do so does not appear to have been questioned. And we are bound to presume that when the framers of the present constitution literally copied from the late constitution the clause defining appellate jurisdiction of this court in cases in equity, they knew how it had been construed, and intended that it should thereafter be construed as it theretofore had been. "It is a safe rule of construction that, when framing the organic law of the state, the convention thought proper to borrow provisions from the constitutions of other states, which provisions had already received a judicial construction, they adopted the provisions in view of such construction and acquiesced in its correctness." *People v. Coleman*, 4 Cal. 46. *A fortiori*, when a clause in an earlier constitution, after having received a judicial construction, is copied into a later one of the same state. It is, however, contended that while there is no difference between the clauses of the late and present constitutions, which define the appellate jurisdiction

of this court in equity cases, its jurisdiction in divorce cases, if it ever had any, is taken away by the clause in the present constitution which defines the jurisdiction of superior courts, and which expressly confers on them original jurisdiction "in actions of divorce."

In support of that theory it is said that the common law of England prevails here, except so far as it is superseded or modified by some statute or fundamental law of our own, and that at common law no court could grant a divorce *a vinculo*, parliament alone having that power. Therefore it is claimed that no court, in the absence of some statutory or constitutional provision expressly conferring that jurisdiction upon it, can exercise original or appellate jurisdiction in divorce cases; that in analogy to the procedure in England the legislatures of the several states of the United States, in the absence of any statutory or constitutional provision on the subject, would possess the exclusive power to grant divorces *a vinculo* in their respective states; and that this gives great significance to the action of the late constitutional convention, in conferring upon superior courts original jurisdiction of actions "of divorce" *eo nomine*, and in omitting any express mention of them in the clause which defines the jurisdiction of this court. The effect claimed for this is that it confers on the superior courts a jurisdiction which their predecessors, the district courts, exercised under constitutions which did not expressly confer on them jurisdiction in divorce cases, and deprives this court of a jurisdiction which it exercised unchallenged for 15 years, basing its right to do so upon a constitutional provision, of which a literal copy may be found in the present constitution.

It is true that divorces *a vinculo matrimonii* in Great Britain were, at least for a long time prior to 1858, granted by act of parliament exclusively; but it is not quite so clear that such divorces were not at one time granted by the high court of chancery, which borrowed its jurisdiction from the *æquitas* and judicial powers of the Roman magistrates. In *Wightman v. Wightman*, 4 Johns. Ch. 343, Chancellor KENT says:

"All matrimonial and other causes of ecclesiastical cognizance belonged originally to the temporal courts, (*vide* the *Case of Legitimation and Bastardy*, Sir J. DAVIES' Rep. 140, and his argument in the *Case of Præmunire*, Id. 273;) and when the spiritual courts cease, the cognizances of such causes would seem, as of course, to revert back to the *lay* tribunals."

From the argument in the *Præmunire Case*, above cited, we extract the following paragraph:

"First, then, let us see when this distinction of ecclesiastical or spiritual causes from civil and temporal causes did first begin in point of jurisdiction. Assuredly for the space of 300 years after Christ this distinction was not known or heard of in the Christian world. For the causes of testaments, of matrimony, of bastardy and adultery, and the rest which are called ecclesiastical or spiritual causes, were merely civil and determined by the rules of the civil law, and subject only to the jurisdiction of the civil magistrate, as all civilians will testify with me."

Gibbon says :

"The magistrates of Justinian were not subject to the authority of the church; the emperor consulted the un-believing civilians of antiquity; and the choice of matrimonial laws in the Code and Pandects, is directed by the earthly motive of justice, policy, and the natural freedom of both sexes."

It is clear, therefore, that in Roman jurisprudence divorce cases were heard and determined by the civil magistrates, who had jurisdiction of cases both at law and in equity, as we now distinguish them.

"In the reign of Richard II. the Barons formally declared that they would not suffer the kingdom to be governed by the Roman law; and the common-law judges prohibited it from being any longer cited in their courts. This action was certainly a mistake, and it produced an opposite effect from the one intended. *The Roman law, instead of being banished, was simply transferred to another court which was not governed by common-law doctrines.* As the law courts cut themselves off from all opportunity of borrowing equitable principles from this foreign source, the necessity arose for a separate tribunal, in which those principles could be recognized. It therefore followed, immediately upon this prohibition, that the hitherto narrow jurisdiction of the court of chancery was greatly increased, and extended over subject-matters which required an ample and constant use of Roman law doctrines." 1 Pom. Eq. 20.

It would not necessarily follow from this that the court of chancery succeeded to all the powers of the Roman magistrates, except those which the common-law courts were administering; but it does seem to us that the court of chancery might, unless prohibited by act of parliament, have exercised jurisdiction in matrimonial as well as in other causes, and there is some evidence of its having done so. "Tothill, in his transactions of the court of chancery, states that there are on the rolls of the court two decrees for divorce (but of what description he does not mention) in the time of Henry VIII., and two in the time of Elizabeth, after verdicts in the court of queen's bench, I presume for adultery. I have been unable to discover them even with the help of Mr. Monro. *It is not unlikely, however, that the court of chancery, under its clerical chancellors, exercised jurisdiction to decree a divorce a vinculo matrimonii.*" 1 Spence, Eq. 702. The first edition of Tothill's book was published in 1649, and, as he is styled a "famous lawyer," it is highly probable that what he relates as having occurred not long before the time in which he lived actually took place.

Conceding, however, the fact to be otherwise, it is quite clear that the civil courts did not decline such jurisdiction because it had been conferred on the spiritual courts. If those courts ever claimed the power, they never, after a date long anterior to the reformation, attempted to decree a divorce *a vinculo matrimonii*. For more than 200 years, at least, prior to a recent date, when the divorce court was

established in England, marriage was there treated as a *status* or condition which was indissoluble except by death or act of parliament.

"But the marriage *status* is entered into through the door of an ordinary contract; and for avoiding ordinary contracts, the jurisdiction of equity extends to all questions of fraud, mistake, duress, and lunacy. Hence, when an impediment of this sort intervenes, and jurisdiction for nullity has been conferred on no court by statute, our equity tribunals will entertain the complaint and declare the marriage void. Equity in England will not do this, because formerly there was an express jurisdiction in the ecclesiastical courts and now there is in the divorce courts." 2 Bish. Mar. & Div. § 291.

Now, as before the statute permitting divorces by courts, the contract is to assume the duties and obligations of matrimony. The contracting parties cannot limit these duties or obligations, nor expressly provide that their binding force shall last for a period other than life. But the duties and obligations are assumed only by the mutual consent of the parties, and marriage itself is often spoken of by law-writers and judges (without material inaccuracy) as a "civil contract." Assuming, however, the marital *status*, into which the parties enter through a contract, is itself more than or different from ordinary contracts, yet when the legislature of this state provided that the relations between husband and wife, previously indissoluble, might be terminated as the result of a judicial proceeding, the nature of the *status* was, to that extent, modified, and it assumed the character of a contract, from future compliance with the obligations of which the parties cannot indeed release each other, but from which they may be relieved by the decree of an appropriate tribunal.

Under the statute the marriage state is subject to termination by judicial decree. This element of possible disavowance affects the contract because the parties marry in view of a possible divorce, and the decree of divorce operates on the contractual relations by relieving the spouses of the duties they have assumed towards each other by or through a contract; the power to divorce which, save for the prohibition of the constitution, could have been exercised by the legislature, has become judicial. Courts of equity have jurisdiction to decree or declare dissolution of copartnerships, and of other like contracts entered into to continue indefinitely, where there are mutual and continuing conditions. It would seem there could be little doubt that, when marriage has been deprived of its quality of indissolubility, and no special tribunal has been created for divorce cases, courts of equity should assume cognizance of such actions. Courts of equity have always exercised an analogous jurisdiction; their modes of procedure are adapted to the inquiries involved, and their decrees are more specific and flexible than the ordinary law judgments. It is therefore not surprising that this court should have uniformly regarded actions of divorce as "cases in equity." The fact that it did so regard them is too clear to admit of doubt, and that being so its rea-

sons for so regarding them are not now important. Our position is that, for a period of 30 years next preceding the adoption of the present constitution, actions of divorce were uniformly held to be "cases in equity," and that the framers of the present constitution were aware of that when they conferred on this court jurisdiction "in all cases in equity."

On the other hand, it is contended that the framers of the present constitution manifested their intention to effect a material change in that respect by conferring original jurisdiction on the superior court in actions of divorce *eo nomine*, and omitting to confer appellate jurisdiction in divorce cases *eo nomine* on this court. But it conferred no other or greater jurisdiction on the superior courts in divorce cases than their predecessors, the district courts, had exercised from the first under the constitutions in which no special mention was made of such cases. And from 1874 down to the date of the adoption of the present constitution, there was no statute in force which expressly conferred such jurisdiction on the late district courts. The language of the Code was and is that "marriage may be dissolved (1) by the death of either of the parties; or (2) by a divorce adjudged by a court of competent jurisdiction." To ascertain what court had "competent jurisdiction," it was necessary to consult the constitution, which simply declared that "the district courts shall have original jurisdiction in all cases in equity," etc. Why original jurisdiction in actions of divorce was not expressly conferred by the Code, as it had previously been by statute, on the district courts, we will not attempt to explain. But from January 1, 1878, down to the time when the present constitution went into effect, the district courts derived whatever jurisdiction they had in divorce cases from the same source that this court has always claimed to derive its jurisdiction in such cases, viz., the constitution. Nor can we satisfactorily explain why the words "of divorce and for the annulment of marriage," which are not to be found in either of the earlier constitutions, were inserted in the present constitution. They give the superior courts no greater or other jurisdiction in such cases than their predecessors, the district courts, had exercised under both of the former constitutions, neither of which contained those words. And we cannot adopt the suggestion that they were inserted in the clause defining the *original* jurisdiction of the *superior courts*, for the purpose of curtailing the *appellate* jurisdiction of *this court*. That is not the way in which the framers of constitutions and laws express their intentions. If the intention had been to take from this court the jurisdiction which it had previously exercised in divorce cases, the very clause under which, for a period of 17 years, it had claimed such jurisdiction, would not have been copied *verbatim*.

But, while entertaining no doubt of the appellate jurisdiction of this court in divorce cases, pure and simple, it is at least pertinent to remark that this is not simply an action of divorce. Section 78 of the

Civil Code provides: "If either party denies the same, or refuses to join in a declaration thereof, the other may proceed, by action in the superior court, to have the validity of the marriage determined and declared." The first count of the complaint, or separate statement of a cause of action, herein, after alleging, in three paragraphs, the residence of plaintiff, her marriage with defendant, their cohabitation as husband and wife, and that, on the twenty-fifth of August, 1880, they jointly made a written declaration of marriage, proceeds to aver that about the twenty-first of November, 1881, "the defendant demanded of plaintiff a surrender to him of said declaration of marriage, and threatened plaintiff with personal violence, in case she refused to comply with said demand; *refused to recognize his said marriage* with plaintiff; drove the plaintiff away from him, and refused to live or cohabit with her, unless she complied with his demand; and the defendant, for more than one year last past, has not lived with plaintiff, nor has he requested her to return to or live with him, thereby willfully deserting the plaintiff." The answer denies the marriage and execution of the declaration. The prayer of the plaintiff is that "her marriage with said defendant may be declared legal and *valid*, and that she may be divorced," etc. If the plaintiff had utterly failed to prove any cause for divorce, she would have been entitled to a decree declaring the alleged marriage valid, if the evidence established the fact of marriage. An action to have the validity of a disputed marriage determined and declared, under section 78 of the Civil Code, is in its nature a suit in equity. Such an action is not a "special proceeding;" for, even if it should be conceded that the right was newly created, no special proceedings for enforcing it are provided by the statute. The judgment herein, in effect, responds to the prayer of the complaint, and declares that the alleged marriage was a valid marriage. From that portion of the decree, in any view of the case, an appeal lies.

If the order for the payment of alimony and counsel fees is in the nature of a final judgment, it is appealable. It certainly possesses all the essential elements of a final judgment. Nothing remained to be done except to enforce it, and for that purpose an execution might issue and be proceeded on, as if the judgment had been rendered in an ordinary action for the recovery of a specific sum of money. Although the pendency of an action for divorce constituted the basis of the order, it was no part of the relief demanded by the plaintiff in her complaint. She might, at any time during the pendency of the action, have applied to the court for such an order; and, if granted, it would not be affected by subsequent proceedings in the action. Its validity would not depend in any way on the result of the action. If the court had afterwards found that the marriage relation never existed between the parties, that would not have affected the order for the payment of *temporary* alimony. It would have afforded good ground for vacating it. It was, to all intents and purposes, "a final

judgment entered in an action,"—quite as much so as the decree of divorce in this case, in which "the question of property" is reserved for future consideration, "with leave to the plaintiff to apply, upon the coming in of the referee's report, * * * for a future and *final decree*." But it has not been suggested that the decree appealed from is not a final judgment in the action. It is final upon the questions adjudicated in it, and the order for the payment of temporary alimony is a final judgment upon all the questions adjudicated in it.

A final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final as to that question. The Code provides for an appeal from a final judgment, not from *the* final judgment, in an action. In some of the states the question has been directly passed upon by the courts; some holding that such orders are, and others that they are not, appealable. Of course, it rarely happens that the constitutions and statutes relating to appeals are precisely alike in any two states. But the reasons given by the courts for holding that appeals might or might not be taken from such orders in their respective states are worthy of consideration.

In *Lochnane v. Lochnane*, 78 Ky. 468, the court says:

"That an appeal may be taken from a decree making an allowance to support the wife pending a suit for divorce cannot be questioned. It possesses all the essential elements of a final judgment. It may be enforced by rule or execution, and is in every respect independent of the final determination of the court as to the rights of the party in regard to the question of divorce."

In *Hecht v. Hecht*, 28 Ark. 92, it was contended by the appellee that, inasmuch as the original suit between the parties was still pending in the circuit court, no appeal would lie to the supreme court from an order granting alimony and counsel fees, until a final decree in the suit had been rendered. The court said:

"Section 4, art. 7, of the constitution, provides that final judgment in the inferior courts may be brought by writ of error or by appeal into the supreme court, in such manner as may be prescribed by law. It is not necessary for us, in the determination of this case, to construe this and section 15 of the same article. The order or judgment of the court is not, strictly speaking, an interlocutory one. While it may be true that a petition for alimony and attorneys' fees could not be brought as a separate and independent suit, yet it is also true that such an application and order for an allowance, *pendente lite*, especially such a one as is made in this case, is, so far as it affects the rights of this appellant, in its consequences, wholly independent of his suit for divorce. This is a definite judgment, from which the appellant can have no relief by the final decree, even though it should appear that injustice had been done him. By due process on the execution, the money will have been collected and paid over to the parties in whose favor it is awarded, and its recovery will have passed beyond the power of the court. It is true that the allowance of alimony and other necessary costs is discretionary with the court trying the case, and will be interfered with by this court only upon the clearest proof that there has been a palpable abuse of that discretion. Yet, when there has been such abuse which affects the substantial rights of a party, we are of opinion that he can have redress by appeal to this court."

In *Golding v. Golding*, 74 Mo. 123, an appeal was taken to the supreme court from the judgment of the St. Louis court of appeals, affirming a judgment of the circuit court of St. Louis county, granting a decree of divorce to plaintiff and allowing her, as alimony, the gross sum of \$15,000. The supreme court had no jurisdiction in divorce cases, when taken there by appeal from the St. Louis court of appeals, to pass upon the question whether the decree granting a divorce was justified by the evidence; and it was contended for the respondent that that provision of the constitution which permitted appeals in cases where the "amount in dispute, exclusive of costs, exceeds \$2,500," had no application, "because the divorce was the matter in dispute, and the alimony was but an incident to the dispute." But the appellate court held against the respondent on the point and reviewed the award of alimony.

In *Blake v. Blake*, 80 Ill. 523, the supreme court of that state, in ruling upon a motion exactly like the one now under consideration, said:

"The question raised is one that has never been passed upon by this court, but, upon first impression, we are of opinion the appeal will lie. It is a money decree; is for a specific sum; and is payable absolutely. No execution has been as yet awarded, but the court has the undoubted authority to award an execution; or, if payment was willfully and contumaciously refused, the decree might be enforced by attachment as for contempt, or payment might be coerced by sequestration of real or personal estate. By one mode or the other, the decree could be enforced, and, if defendant has property, it could, in some way, consistently with the practice in the courts of chancery, be subjected to its payment. Such a decree does not seem to us to be merely interlocutory. It is more in the nature of a final decree, and if no appeal lies, this case affords an instance of a money decree against a party from which no relief can be had, no matter how unjust or oppressive. This ought not to be. It is no answer to this position to say, defendant can have this decree against him reviewed on appeal or error after final decree in the original cause. Of what avail would that privilege be to him then? The litigation might be protracted, and years elapse before any final decision could be reached. In the mean time, he has been imprisoned for disobedience to the decree, or his property, under process of law, been subjected to the payment of the sum decreed. Nor does the fact that an appeal is allowed impose any hardship not incident to other money decrees from which appeals may be prosecuted. On the theory that alimony is for the immediate benefit of the wife, to enable her to prosecute or defend her suit against her husband on terms of equality, the only serious result would be to delay the litigation until the propriety of the decree for temporary alimony and solicitors' fees could be determined in the appellate court. On the contrary, if an appeal should be denied, it might subject defendant to very great hardships in many cases, as the sequel will show. It is apprehended there can be no decree against a party that will work a deprivation of his property or liberty, from which no appeal or writ of error will lie. Such is the decree against defendant. Under it he may be deprived of his liberty, or his property subjected to levy and sale."

The statute then in force in that state, in relation to appeals, was not substantially different from our own. The reasoning of the Illinois court becomes much stronger when applied to the present case,

where the main controversy between the parties is the question of marriage. It is, of course, indispensable to the granting of alimony at all, that the relation of husband and wife, in fact, exists. We are of opinion, therefore, that the order in question is in its legal effect a judgment, and appealable as such. Indeed, the very section of the Code of Procedure, under which execution was directed to be issued, placed such order upon the same plane as a judgment. It reads: "Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this Code, it may be enforced by execution in the same manner as if it were a judgment." And by section 942 of the same Code it is provided that "if the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant," etc. Such undertaking was executed in this case and wrought a stay of proceedings under the order.

As the order for the payment of alimony and counsel fees is an appealable order, it cannot be reviewed on the appeal from the judgment decreeing a divorce. Motions to dismiss the appeals from the judgment, and from the order for the payment of alimony and counsel fees, are denied. And it is ordered that all proceedings upon the last-named order and the judgment be stayed pending said appeals.

We concur: ROSS, J.; MYRICK, J.; THORNTON, J.; MCKINSTRY, J.

McKEE, J., *dissenting*. Two appeals have been taken in the case: one from the final judgment of divorce, entered on the nineteenth of February, 1885; the other from an order made on the sixteenth of February, 1885, awarding to the plaintiff in the action alimony and counsel fees. To render his appeals effectual appellant has obtained from this court an order requiring respondent to show cause why, pending the appeals, all proceedings upon the judgment and order appealed from should not be staid. This rule for a stay of proceedings has been met by a counter-motion to dismiss the appeals, upon two grounds, viz.: That the order is not appealable, and that no appellate jurisdiction of judgments of divorce has been given by law to this court. If these grounds be well taken they constitute sufficient cause against granting a stay of proceedings. The order appealed from was made before the entry of judgment. An order made before judgment in a cause is interlocutory; that is to say, it is an order made between the commencement of the action and its final determination, incident to and during the progress of the action, which decides not the cause, but only some intervening matter relating to the cause. 2 Abb. Dict. 637. Under the Code law of the state an appeal is the only mode in which a judgment or an order in a civil action can be reviewed. An interlocutory order is, therefore, not reviewable, except by an appeal directly from it, or from the judgment

in the cause, under the conditions specified in section 956, Code Civil Proc. The right of appeal is entirely statutory. By chapter 1, tit. 13, Code Civil Proc., the legislature has enumerated and defined the character and nature of the cases permitted to be appealed from the superior court to this court. These are:

"Sec. 939. An appeal may be taken: (1) From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one year after the entry of judgment; but an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment. (2) From a judgment rendered on appeal from an inferior court, within ninety days after the entry of such judgment. (3) From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order dissolving, or refusing to dissolve, an attachment; from an order granting, or refusing to grant, a change of the place of trial; from any special order made after final judgment; and from an interlocutory judgment in actions for partition of real property; and from an order confirming, changing, modifying, or setting aside the report, in whole or in part, of the referees in actions for partition of real property, in the cases mentioned in the provisions in section 763 of this Code, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk."

All orders made in a case before judgment other than these enumerated are, therefore, unappealable; for, as the remedy by appeal is purely statutory, the right cannot be extended to cases not included within the statute. Assuming, therefore, that the order appealed from is an interlocutory order, as it is not one of the interlocutory orders designated in the Code, to which the remedy of appeal attaches, no appeal can be taken from it. This is the settled law as to appeals from interlocutory orders; and it is applicable alike to all cases of law or equity. 1 Rhodes' Cal. Dig. 31-33; *Broadribb v. Tibbets*, 60 Cal. 412; *Macnevin v. Macnevin*, 63 Cal. 186; *Holmes v. McCleary*, Id. 497; *People v. Markham*, 64 Cal. 157; *Emeric v. Alvarado*, Id. 529; and *Beach v. Hodgdon*, 5 PAC. REP. 77.

But the contention is that, as the order in this case commands payment of a large sum of money, it is more than interlocutory,—it possesses the force and dignity of a final judgment, because the Code provides (section 137, Civil Code) that it may be enforceable by execution; and being enforceable by execution it is equivalent to a final judgment, which is appealable. If that position were maintainable the giving of the requisite undertaking on appeal, as from a money judgment in a case, would itself operate, under section 940, Code Civil Proc., as a stay of proceedings; and this court could, in the exercise of its appellate jurisdiction, in case of failure or omission to file a proper undertaking on appeal, permit him to perfect his appeal by filing a new undertaking. But section 940 and those sections of the Code which follow it have no reference to non-appealable orders; they regulate the mode of appealing from final judgments and appealable orders in suits at law or in equity. Besides, the interlocutory char-

acter of the order appealed from is not changed by the fact that it commands payment of a large sum of money. Nor is it affected by the provision of the Code as to the process by which it may be enforced. It is the execution that may be issued upon the order to which the Code gives the same legal effect as if issued upon a final judgment. The order is unchanged in its nature by the remedy adopted for enforcing it, and the execution is given merely as an additional remedy for that purpose. As an additional remedy the court making the order is not bound to resort to it. Especially in actions of divorce it is left to the discretion of the court to enforce an order made *pendente lite* by execution, or by proceedings for contempt for not complying with it, or by requiring reasonable securities for making the payment of the money, or by the appointment of a receiver, or by any other remedy applicable to the case. Section 140, Civil Code. As remedies for the enforcement of an order *pendente lite*, these, with the exception of the remedy by execution, are not prescribed by the Code for the enforcement of a money judgment.

Moreover, a judgment is the final sentence of the law in an original suit; a money judgment is a legal demand or a record debt upon which suit may be brought. The money order in this case is for alimony. Alimony is not an original suit; it arises out of some other suit in which a marriage *de facto* is confessed or proved. The allowance of alimony, pending such a suit, is not a debt; it is a legal liability which arises out of the obligation imposed by law upon every married man to contribute to the support of his wife. When the fact of marriage is judicially ascertained the jurisdiction of the court to award alimony, *pendente lite*, as incidental to the suit before it, may be called into exercise by the motion of the wife; and the court, in the exercise of its jurisdiction, may award it out of the community property or the separate property of the husband. Section 141, Civil Code. In making the award the court acts upon the principle that the husband and wife are jointly interested in the property and fortunes of the community, and that one is as much entitled as the other to maintenance and support out of it during the proceedings between them for a separation. So that allowing the wife alimony is only awarding her what she is, as a wife, lawfully entitled to. Her rights of property in the community estate are vested until divested by a judicial decree which dissolves the marriage *status* and makes distribution of the estate. Given, therefore, jurisdiction of the parties to an action of divorce by a court of competent jurisdiction, the court also acquires jurisdiction of the estates and income of the husband for the purpose of compelling the husband to support the wife pending the action. Section 137, Civil Code, provides:

"While an action for divorce is pending the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action. When the husband willfully deserts the wife, she may, without applying for a di-

voice, maintain in the superior court an action against him for permanent support and maintenance of herself or of herself and children. During the pendency of such an action the court may, in its discretion, require the husband to pay as alimony any money necessary for the prosecution of the action and for support and maintenance, and executions may issue therefor in the discretion of the court. The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked, at the discretion of the court."

And when the court, in the exercise of its discretionary power, ascertains and fixes the amount of the alimony, and awards it to the wife, the right to the amount awarded attaches to her and becomes vested in her as a right, and there arises a corresponding duty on the part of the husband to pay it to her. The order binds both the right and the duty; and, as an order made in the exercise of a discretionary power, it is not, in its nature, or the remedy adopted for its enforcement, subject to the control of the court. It is not a debt which the husband is required to pay. It is a duty which he is bound to perform. *Chase v. Ingalls*, 97 Mass. 524. This is the settled law of the question of alimony *pendente lite* in an action of divorce.

In *Miller v. Miller*, 75 N. C. 71, the supreme court of North Carolina says:

"The statute relating to divorce and alimony proceeds upon the natural duty of the husband to support the wife as well before as after divorce, and must be liberally construed to express that duty. Alimony is not itself an 'estate' in a technical legal sense of the word, nor is it necessarily a charge upon the husband's estate. He may have no estate. But alimony is a mere personal charge upon the husband, or a duty imposed upon him which the courts will enforce against him from time to time, at discretion, compelling the payment thereof from his income, whether he have an estate or not."

In this state the question arose in *Ex parte Perkins*, 18 Cal. 60. There the defendant in an action of divorce was ordered, *pendente lite*, to pay to the wife a certain sum of money for her support during the litigation and for counsel fees and other legal expenses. The court enforced its order by imprisonment for contempt in not complying with the order; and the defendant asked to be discharged from imprisonment upon the ground that the sum adjudged to be paid to the wife was a debt within the meaning of the constitution, for which he could not be legally imprisoned. But the supreme court said, Mr. Justice BALDWIN delivering the opinion:

"This is not a debt within the meaning of the constitution. The husband is bound to support the wife, yet his duty is an imperfect obligation which is not technically a debt. He does not owe her any specific amount of money; but he owes a duty to her which may be enforced by the order of a court compelling him to pay her money. So alimony, temporary or permanent, may be decreed by the court, and this may be done at the discretion of the court."

In the proceedings in that case it was conceded that there was no appeal from the order, because it was an order *pendente lite*, and therefore interlocutory, to which the right of appeal was not extended

by section 336 of the practice act, which then regulated appeals to the supreme court from the judgments and orders of the district courts; and the husband afterwards sought to have the order reviewed on *certiorari*; but as the alimony awarded was within the discretion of the court, it was held, upon the reasons stated by Mr. Justice BALDWIN, to be unreviewable. See, also, *Call v. Call*, 65 Me. 407. The order was therefore absolute, and, so far as other courts are concerned, final, subject only to be changed, modified, or revoked by the court that rendered it, in the exercise of its discretionary powers. Such being the nature of an order awarding alimony pending an action of divorce, it is not an intermediate order which affects the merits of the action itself, or the final judgment that may be rendered therein; for a divorce may or may not be granted in the action. It is therefore not reviewable under section 956, Code Civil Proc., by appealing from the final judgment, if the law grants the right to appeal from it. And that brings us to the consideration of the question, Is there an appeal to this court from the judgment of a superior court in an action of divorce?

The question must be determined with reference to the constitution of 1879, and the laws enacted in conformity to it in carrying out its provisions as to the organization and jurisdictions of the two courts. By section 5 of article 6 of the constitution it was ordained as follows:

"The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate; of divorce and for annulment of marriage; and of all such special cases and proceedings as are not otherwise provided for."

As organized under and by virtue of this section, the superior court consists of seven or eight different courts; namely, a court of law, a court of equity, an insolvency court, a court of forcible entry and detainer, a probate court, a criminal court, a court of divorce, and a court of special cases and proceedings; and, when sitting in any one of those courts, the superior court has and exercises jurisdiction of matters cognizable in the court.

At the same time that the superior court was created and partitioned off into different courts, and clothed with the jurisdiction belonging to each, the supreme court of the state was reorganized and invested with its appellate and original jurisdiction. Section 4 of article 6 of the constitution declares:

"The supreme court shall have appellate jurisdiction in all cases in equity, except such as arise in justices' courts; also, in all cases at law, which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars;

also, in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law; also, in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone. The court shall also have power to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction."

This grant of judicial power expressly includes within the appellate jurisdiction of the court cases of law and equity, cases of forcible entry and detainer, cases of insolvency, cases for preventing and abating nuisances, probate matters, and criminal cases; but it excludes, negatively at least, from the jurisdiction of the court cases for annulment of marriages and of divorce, and special cases and proceedings. No express mention is made of any one of these cases as cases of which the supreme court had jurisdiction. Special cases, it has been adjudged, do not fall within the jurisdiction of the court, (*Bixler's Appeal*, 59 Cal. 550,) and for the same reasons divorce cases do not, unless they are to be considered as included with one or other of the two great divisions of administrative justice known as law and equity. *Id.*

That much is conceded by counsel for appellant. It is also conceded that an action of divorce is not an action at law. They say:

"It must be either an action at law, a suit in equity, or, in the language of the constitution, 'it is a case in equity or a case at law;' that is, it is the former, (and not the latter,) as has been generally assumed by the courts of equity in this country, and particularly so in the state of California. If an action for divorce falls within the expression 'case in equity,' then, clearly, by the terms of the constitution, this court has appellate jurisdiction in such cases."

Thus stated, the contention is reduced to the single proposition that an action of divorce is a suit in equity; and that is the question. The chancery court of England, as the "king's high court of conscience," claimed an elastic, original, concurrent, and auxiliary jurisdiction, under which it assumed to exercise a supervisory control, according to equity principles, of almost all proceedings in the superior courts of common law. But it never claimed to have or exercise original or concurrent jurisdiction of the subjects of marriage and divorce. These were alone cognizable in a court known as the "ecclesiastical court," whose jurisdiction, being founded on the canon or civil law, was entirely separate from the secular jurisdiction of other courts. It is true that the court, under the influences of legislation and judicial construction, slowly developed from a spiritual court into the form prescribed for it by the common law; and the legal powers which it exercised became part of the common-law system of jurisprudence; but it retained its name and its exclusive jurisdiction throughout all its changes in form. With that jurisdiction the chancery court never interfered, except incidentally, by issuing original writs to keep the court within its jurisdiction, or to aid it, after

divorce, in enforcing its decrees or orders, or to prevent the husband from evading by fraud payment of alimony awarded to the wife. Otherwise the chancery court never claimed or exercised any original or concurrent jurisdiction over the subjects of marriage and divorce. These constituted the subject-matters of jurisdiction which under the common law belonged at all times exclusively to the ecclesiastical courts.

In Fonbl. Eq. note *n*, p. 107, it is said:

"The right to decree alimony was only exercised as incidental to an action of divorce, and a decree of divorce, or even a separation, was never even suggested to be within the jurisdiction of a court of equity, except after divorce or upon special agreement."

And in *Head v. Head*, 3 Atk. 550, Chancellor HARDWICKE observed:

"I do not find that this court ever made a decree for establishing a perpetual separation between husband and wife, or to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even upon this unwillingly." See Story, Comm. §§ 1420, 1425; *Mattison v. Mattison*, 1 Strob. Eq. 387.

So, in an action in equity to prevent a decree from being defeated by fraud, the supreme court of the United States took occasion to say:

"Our first remark is, and we wish it to be remembered, that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud. We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board." *Barber v. Barber*, 21 How. 584.

Unquestionably, therefore, under the common law wherever established, no other than the ecclesiastical or spiritual court had the legal power to grant divorces or annul marriages; and that court, as a court of divorce, administered its powers by a body of principles and procedure of its own, which, in themselves, constituted a system of jurisdiction as separate and distinct as that of a court of law or of equity or admiralty. As incidental to its power, it assumed control of the property of the parties, and allowed alimony to the wife, pending an action of divorce, on the principle that she—the husband having possessed himself of her fortune—was without sufficient means, independent of him, to support her in her condition in life; and it exercised its discretion in making the allotment. When made, the sentence of allotment was absolute, subject only to be revised and modified by the court itself. Its decisions, as to matters within its jurisdiction, could not be revised by the civil courts. No appeal lay from them to any secular jurisdiction. An appeal might be taken to the pope, or to his legate, until the statute of Henry VIII. abolished that procedure, and substituted an appeal to the high court of parliament. *Browne, Ecc. Law*, 507.

It may be conceded that this system of jurisdiction was a part of

the common law which constitutes the basis of the jurisprudence of the state, but we have never had an ecclesiastical court; yet the legal powers formerly exercised by that court were part of the sovereign power of the people of each of the several states of the United States; and the people themselves could, by constitutional command or legislative enactment, delegate those powers to any tribunal they saw fit to create, to be exercised absolutely or otherwise. Until the people did delegate such powers they remained in abeyance; there was no inherent jurisdiction in courts of law or equity to grant divorces; hence, at an early day in the history of the country, Judge Gaston, of North Carolina, held that, in the absence of constitutional provisions or of legislation upon the subject of marriage and divorce, the courts of North Carolina had no jurisdiction of divorce suits, or to grant alimony. *Wilson v. Wilson*, 2 Dev. & B. 377.

And Chancellor KENT, in his Commentaries, shows that, although, prior to the revolution, a court of chancery had existed in every one of the 13 colonies, yet, for 100 years preceding the revolution, and for many years after New York became an independent state, there was no lawful mode of obtaining divorce until the legislature, in 1787, authorized the court of chancery to pronounce divorces *a vinculo*. 2 Kent, Comm. 98, 125. "The true doctrine is," says Bishop, in his treatise on Marriage and Divorce, "that no judicial tribunal can take jurisdiction of divorce cases unless the authority is specially conferred by the constitution of the state, or by some law duly passed by the legislature." Bish. Mar. & Div. § 71; *Jarvis v. Jarvis*, 3 Edw. Ch. 462; *Jamison v. Jamison*, 4 Md. Ch. 298; *Wright v. Wright*, 2 Md. 447; *Barker v. Dayton*, 28 Wis. 379; *Hopkins v. Hopkins*, 39 Wis. 171; *Bacon v. Bacon*, 43 Wis. 202; *Grant v. Grant*, 12 S. C. 29, 31; *Cook v. Cook*, 56 Wis. 203; S. C. 14 N. W. Rep. 33, 443; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456.

Every state has the inherent right to distribute judicial powers over such subjects to tribunals of its own creation, and to define the jurisdiction of each, and prescribe its mode of procedure. And it will be found that most, if not all, the decisions by courts of other states cited to uphold the right of appeal in such cases, rest upon either a constitutional or legislative grant of original jurisdiction in such cases to courts of law, or courts of chancery, to be exercised according to legal or chancery principles and practice, or of appellate jurisdiction to the supreme court "in all cases." Thus the states of Massachusetts and New Hampshire, by their respective constitutions, ordained that "causes of marriage, divorce, and alimony, and all appeals from the judges of probate, shall be heard and determined by the governor and council, until the legislature shall by law make other provisions." Article 5, c. 3, Const. Mass.; section 76, pt. 2, Const. N. H. Georgia, by her constitution, prohibits divorces being granted, except on the concurrent verdicts of two special juries,—the jury rendering the final verdict being authorized to determine the rights and disabilities of

the parties, subject to revision by the courts upon legal principles. Section 11, art. 5, Const. 1868. Alabama and Mississippi, by their respective constitutions, provide that divorces shall not be granted but in cases by suit in chancery, provided for by law. Section 3, art. 4, Const. Ala.; section 15, art. 3, Const. Miss.

The constitutions of other states, whose adjudications have been cited on argument, contain no express grants of jurisdiction of the subjects of marriage and divorce to any judicial tribunal. Power, however, has been delegated to the legislature of each of those states to select or establish a judicial tribunal upon which to confer legal powers to annul marriages and grant divorces; and it will be found that the legislature has generally vested such jurisdiction and powers in a separate court of chancery, sometimes in a *nisi prius* court, and at others in a *nisi prius* court sitting as a court of chancery. Thus in Arkansas it is provided:

"The circuit court, sitting as a court of chancery, shall have jurisdiction in all cases of divorce and alimony, or maintenance and like process, and proceedings shall be had in said cases as are had in other cases on the equity side of said court." Sec. 3, c. 59, Dig. St.; *Bauman v. Bauman*, 18 Ark. 320.

Kentucky conferred such jurisdiction upon the chancery court by statute of 1809, (*Maguire v. Maguire*, 7 Dana, 181;) Maryland by statute of 1841, supplemented by statutes passed in 1843 and 1844, (*Brown v. Brown*, 2 Md. Ch. 316; *Bayly v. Bayly*, Id. 326;) New York by statute passed in 1824, (*Perry v. Perry*, 2 Paige 501; *Williamson v. Williamson*, 1 Johns. Ch. 488;) Virginia by statute passed in 1827, (*Jennings v. Montague*, 2 Grat. 350;) Illinois by Revised Statute of 1874, (*Dinet v. Eigenmann*, 80 Ill. 274;) Indiana, by Revised Code of 1831, confided the jurisdiction to courts of law, (*Varner v. Varner*, 3 Blackf. 163,) but in 1833 the statute of 1831 was repealed, and the jurisdiction was expressly given to courts of chancery; Ohio by statute of 1835 conferred such jurisdiction on the court of common pleas, (*Hoffman v. Hoffman*, 15 Ohio St. 427;) Rhode Island and Vermont on the supreme court, until the latter state by statute of 1870 granted jurisdiction to the county court, (*Preston v. Preston*, 44 Vt. 630; *Thayer v. Thayer*, 9 R. I. 379.) So that in those states divorce cases are, by express statutory provisions, made cases in law or cases in equity, and appealable as such, unless, as in Kentucky, under a statute of 1816, and in Kansas, under a statute of 1860, appeals in such cases are interdicted. *Maguire v. Maguire*, *supra*; *Worth v. Worth*, 4 Kan. 223

So, when this state, in 1879, in the exercise of its sovereign powers, amended the constitution, it could have granted to the superior court, as a court of law or equity, jurisdiction and powers to annul marriages and decree divorces according to legal or equity principles and practice, and made its judgments and orders final, or revisable by this court; but it did not. The framers of the constitution did not clothe the superior court, as a court of law or of equity, with such

jurisdiction. In their wisdom they framed the constitution so as to prohibit the legislature from passing special laws for granting divorces, (art. 4, § 25;) clothed the superior court with original jurisdiction of divorces and of annulment of marriages, (section 5, art. 6,) and this court, with appellate jurisdiction in cases at law * * * and in cases in equity, * * * and made no express provision for appeal to this court from judgments or orders in divorce cases. Section 4, art. 6. Nor has the legislature, in executing the behests of the constitution as to the organization and jurisdiction of the superior court, made any provision for appeal from its judgment or orders in cases of divorce. It has prescribed the jurisdiction of the court as a court of divorce,—a jurisdiction identical with that formerly exercised by the ecclesiastical courts,—and authorized it to exercise its jurisdiction and powers in the same manner that the ecclesiastical court had exercised them; that is, at its discretion. It provided for an appeal in all cases in law and equity and in probate matters, etc., but it provides no appeal in divorce cases. And the reason for thus regulating the right of appeal is, we think, apparent from the nature of the jurisdiction conferred on the court. The subjects of the jurisdiction are marriage and divorce. "In respect of the constitution of the state," says Mr. Amos in his treatise on the Science of Law, (page 124,) "marriage must be viewed as an act which determines the creation of a new family group, and from which act spring a number of relations, actual and possible, moral and legal; relations which, taken in their aggregate, constitute marriage as a *status*."

In this state marriage is also regarded in law as a *status*,—a public institution,—and more than a mere contract. Section 55 of the Civil Code defines it as "a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations,"—those "actual and possible moral and legal relations" which constitute the *status*. An action for the annulment or dissolution of a matrimonial *status* is therefore not an action in equity, involving the personal and separate property of married women, the adjudication of ante-nuptial or post-nuptial settlements and articles, or of marriage contracts absolutely void as against public policy, or for fraud,—subjects of which chancery courts have no jurisdiction; it is a statutory proceeding within a jurisdiction *sui generis*, which is exercisable at the discretion of the court to which it has been confided; and the judgments and orders rendered by the court in the exercise of its discretionary powers are not reviewable.

In view of this familiar principle of law, knowing that the judgments or orders of any of the judicial tribunals of the state, which may be voidable or void for want of jurisdiction, or excess of jurisdiction, or abuse of discretion, are reviewable by original writs issuable by

the supreme court or the superior courts, the legislature doubtless determined there was no reason for according the right of appeal in divorce cases; therefore no appellate jurisdiction has been by express terms prescribed to this court in such cases, (section 52, Code Civil Proc.,) and the right of appeal is withheld, except where, after granting a divorce, a question arises as to the distribution of the community property or of the homestead property. On a question concerning such property an appeal is expressly allowed by section 148, Civil Code, but on no other question involved in the case. Such was the nature of the appeals decided by this court in the divorce cases of *Bovo v. Bovo*, 63 Cal. 77, and *Brown v. Brown*, 60 Cal. 579, and such have been the nature of appeals in many of the divorce cases in which appeals have been heard and decided by former supreme courts. See *Kashaw v. Kashaw*, 3 Cal. 312; *Elmore v. Elmore*, 10 Cal. 225; *Gimmy v. Gimmy*, 22 Cal. 633, 635; *McLeran v. Benton*, 31 Cal. 29. So that a decree of divorce is not only a dissolution of the matrimonial status, but it is also a dissolution of the marital rights of parties in their real estate; and while this court is denied jurisdiction to disturb that part of the decree granting a divorce, it has jurisdiction to revise that part of the decree for a division of the estate.

Undoubtedly former supreme courts of the state as well as the present court have heard and decided appeals in divorce cases on the merits. In no case, however, has the question to hear and determine such appeals been directly made, except in *Conant v. Conant*, 10 Cal. 249. In that case the appeal was taken from a divorce granted by one of the then district courts to the supreme court, as then clothed with jurisdiction by the constitution of 1849. And it was held that under the constitution, the court had appellate jurisdiction "in all cases," except where the matter in litigation, being capable of pecuniary compensation, did not exceed in value \$200. In rendering its decision, the court said:

"The fourth section of article 6 of the constitution provides that the supreme court shall have appellate jurisdiction in *all cases* when the matter in dispute exceeds two hundred dollars; when the legality of any tax, toll, or impost, or municipal fine is in question; and all criminal cases amounting to felony, on questions of law alone. We do not understand the last words of the first clause of this section as restricting the jurisdiction only to those cases which involve questions of property, or the legality of a tax, toll, impost, or municipal fine. As we read the section, the court possesses appellate jurisdiction in *all cases*: provided, that when the subject of litigation is capable of pecuniary compensation, the matter in dispute must exceed two hundred dollars."

Under the same constitution of 1849, the supreme court, in the year 1861, in deciding an appeal from a divorce granted in the case of *Lyons v. Lyons*, 18 Cal. 447, said: "This is a suit in equity, and the only error assigned is that there are no findings to support the judgment." And, assuming it to be a suit in equity, it was held, on the authority of *Walker v. Sedgwick*, 5 Cal. 192, which was a chan-

cery case, that findings were not necessary. But neither the assumptions in that case, nor *Conant v. Conant*, which was questioned in *Knowles v. Yates*, 31 Cal. 82, and in *Houghton's Appeal*, 42 Cal. 35, nor the practice of dealing on appeal with divorce cases as cases in equity, can be considered as authoritative of the question as now raised for the first time under the constitution of 1879 and the statutes passed in executing its commands.

In view of the constitution and the laws passed under it I think cases of divorce and for the annulment of marriage are not cases of which appellate jurisdiction has been granted to this court. This conclusion is justified, if not sustained, by the reasoning in *Bixler's Appeal*, 59 Cal. 550, and by the decision in the case of *Church v. Church*, No. 9,405, January session, 1884. This last case was a case in divorce commenced and prosecuted since the adoption of the constitution of 1879; dissolution of the marriage was decreed; the wife was awarded the custody of the children; and the husband was adjudged to pay her out of his separate property certain sums of money for alimony and counsel fees, and for the support, maintenance, and education of the children. To enforce payment of the sums awarded for those purposes, the court appointed a receiver to take charge of the separate property of the husband, collect its rents, and pay them to the wife, until the husband gave reasonable security to pay her. He refused to pay or to give security, and appealed from the decree to this court; and, to render his appeal effectual, he applied to the court here and obtained an order to show cause (as has been done in this case) why proceedings in the divorce court should not be stayed pending the appeal, and to fix the amount of an appeal-bond to operate as a stay. But this court refused to interfere with the proceedings of the court below or to fix the amount of a stay-bond.

I think the application for a stay of proceedings should be denied, and the appeals dismissed.

(67 Cal. 86)

OAKLAND BANK OF SAVINGS *v.* APPLEGARTH. (No. 9,636.)

Filed June 26, 1885.

JUDGMENT MODIFIED.

The judgment as rendered, *ante*, 139, modified, and the judgment of the lower court affirmed.

In bank. Appeal from superior court of the county of Merced. The opinion in bank is reported *ante*, 139.

J. K. Law, for appellant.

W. S. Goodfellow and *E. Jackson*, for respondent.

BY THE COURT. It appearing to our satisfaction that the assessments upon the mortgage, and the money deposited for its satisfaction in the county treasurer's office, were not for one and the same year, but for different years, the judgment of this court is hereby mod-

ified by striking out so much of it as directs a modification of the judgment of the court below; and said last-named judgment is affirmed.

(67 Cal. 178)

HIBERNIA SAV. & L. SOC. v. CONLIN and others. (No. 8,767.)

Filed June 29, 1885.

1. ESTATES OF DECEDENTS—PRESENTATION OF CLAIM ARISING ON MORTGAGE.
After the death of a married woman, a claim arising on a mortgage of her separate property, executed by her to secure the note of her husband, is not required to be presented to her personal representatives.
2. STATUTE OF LIMITATIONS—ACCRUAL OF ACTION AFTER DEATH.
Where a cause of action accrues after the death of a person, the statute of limitations commences to run from the date of the accrual.
3. FORECLOSURE OF MORTGAGE—TAXES—INSURANCE.
On foreclosure of a mortgage, a judgment in his favor for taxes and insurance paid by plaintiff is erroneous, where there is no allegation in the complaint in regard thereto.

Department 2. Appeal from superior court of the city and county of San Francisco.

J. M. Chretien and E. N. Deuprey, for appellants.

Tobin & Tobin, for respondent.

THORNTON, J. Action to foreclose a mortgage executed by Catherine M. Conlin on her separate real property to the plaintiff, to secure the note of the defendant John J. Conlin, her husband. The note above mentioned was for \$500, with interest at the rate of 9 per cent. per annum, bore date September 13, 1873, and was payable in 24 equal installments of \$22.84 each; the first installment to be paid one month after date, and another installment each month thereafter, until all were paid. The above-given terms of the note, in the view taken of this cause herein, are alone material.

Catherine M. Conlin died testate on the twenty-eighth of November, 1873, and on the eighth day of January, 1874, M. C. Smith was duly appointed executor thereof. On the sixth of August, 1875, plaintiff presented its claim, duly verified, for the amount due upon said note and mortgage, to said executor, and which was by him allowed. It is also found that the claim was, on the seventh day of August, 1875, presented to the judge of the probate court, by him approved, and thereafter filed with the clerk of the probate court. The above facts are found by the court. The material question in the case arises on the defense of the statute of limitations.

We are of opinion that no presentation of the claim arising on the mortgage made by Mrs. Conlin was required by law. We find nothing in the statute on the subject of the presentation of claims against the estates of deceased persons which calls for any such presentation. Only such claims are required to be presented as, when allowed, will rank among the acknowledged debts of the estate, to be paid in due course of administration. Code Civil Proc. § 1497. Mrs. Conlin owed no debt to the plaintiff. She only conveyed her property

in the mortgage to secure the payment of the debt of another. No action to recover any indebtedness could have been maintained against her in her life-time, should any interest due on the note of her husband have fallen due and remained unpaid. Section 1500, Code Civil Proc., does not apply to this case, for the reason that there could be no recourse under any circumstances against *any other property* of the estate of Mrs. Conlin than that mentioned in the complaint. This is true of every form in which this section has been enacted since the Codes went into effect. It was manifestly the intention of the section last referred to, as it was first adopted and as it was re-enacted in 1876, to give the holder of the mortgage, where he held a claim against the estate secured by it, which, when allowed, would rank with the acknowledged debts of the estate, an election to present the claim for allowance, have it allowed, and proceed to foreclose for the whole amount due on the claim, including any deficiency arising on a sale of the mortgaged premises, or to present no claim and sue on the mortgage alone, and obtain whatever might be realized on a sale of the mortgaged premises under the decree of foreclosure. As the mortgage was not required to be presented, its presentation and allowance did not affect the question as to the statute of limitations.

In *Tynan v. Walker*, 35 Cal. 634, it was held that, where no cause of action accrued to a person in his life-time, but did accrue after his death, the statute of limitations began to run at the date of the accrual, though there was no person in existence competent to sue, and continued to run from such date without cessation. The court, in the case cited, disapproved of the judgment in *Murray v. East India Co.* 5 Barn. & Ald. 204, which had been followed by the highest court of several of our sister states. See cases cited in opinion, 35 Cal. 638. The court further held, in the same case, that the twenty-fourth section of the statute of limitations, then in force, did not apply to a case where the cause of action has not accrued to a person in his life-time. The case of *Tynan v. Walker* will be seen, on examining it, was that of a cause of action accruing after the death of the person who would, if he had survived the accrual, been plaintiff in the action. The case here is one where the action would have been against a person (Mrs. Conlin) as defendant if she had lived until the cause of action came into existence. We see no other difference in the cases, and the reasoning in *Tynan v. Walker*, which met the approval of the court in that case, and the conclusions there reached, apply here. Section 24 of the act of limitations, upon which the ruling in *Tynan v. Walker* was made, is the same as regards the case under consideration as section 353, Code Civil Proc.; the only change made by this section being the substitution of the word "representatives," in the latter clause of the section, for the words "executors or administrators," in section 24 of the act, which is not material here. In accordance with the ruling in *Tynan v. Walker*,

we must hold that, as soon as each one of the installments became due, the statute commenced to run on the mortgage, and from that time continued to run.

This action was commenced on the twenty-sixth of November, 1880. The last installment fell due on the thirteenth of September, 1875. The period of limitation, which is four years, expired either on the thirteenth or fourteenth of September, 1879. It follows from this that the cause of action on the mortgage was barred when this suit was brought.

Sichel v. Carrillo, 42 Cal. 505, relied on by plaintiff, affords no support to its contention that the statute required the mortgage in this case to be presented. The remark in the opinion quoted by counsel for plaintiff is made upon a concession for the sake of the argument, viz., that the statute required the presentation of the mortgage of Mrs. Carrillo, and the learned judge who drew up the opinion intended only to say that, conceding the mortgage was a claim which should have been presented under the statute, it would only be necessary to present it to the administrator of Mrs. Carrillo, and not to the administrator of her deceased husband. This was said in refutation of the contention that it was necessary to present it to the administrator of the deceased husband, which was alone contended for in the case. The finding as to taxes and insurance paid by the plaintiff is outside any issue in the cause. There is no allegation in the complaint as to these matters. The defendants have had no opportunity to take issue as to these payments. Under these circumstances it was error to find as to them, and render judgment for the amount found to have been paid.

Inasmuch as the court finds that the payment of taxes and insurance was authorized by the mortgage, and by the terms of it became a part of the amount due thereon, the judgment will be reversed and the cause remanded, that the question as to these payments may be regularly brought into the case by amendment, and tried. As the cause will go back for a new trial in conformity with this opinion, nothing need be said as to counsel fees, which may or may not be allowed on a future trial.

Judgment reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; MYRICK, J.

(67 Cal. 176)

REYNOLDS v. REYNOLDS. (No. 8,849.)

Filed June 29, 1885.

1. DIVORCE—ATTORNEY'S FEES—ALLOWANCE AFTER CONDONATION.

It is the duty of a court to dismiss an action for divorce by a wife where each party in open court admits condonation and asks for the dismissal of the action; and in such judgment of dismissal the court cannot award the wife attorney's fees, and order the defendant to pay the same.

2. JUDGMENTS—AMENDMENT AFTER APPEAL.

A court has no power to change its judgment, after an appeal has been taken therefrom, so as to prevent the review of alleged errors brought up by a bill of exceptions.

Department 2. Appeal from superior court of the city and county of San Francisco.

Langhorne & Miller, for appellant.

J. D. Sullivan and *D. H. Whittemore*, for respondent.

MYRICK, J. Appeal from that portion of a judgment in a divorce suit which adjudges the payment of counsel fees. The amended pleadings were in, and issues joined, October 18, 1882. On the eleventh of November, 1882, an order was filed which directed the defendant to show cause, on the thirteenth of the same month, why he should not pay to the attorneys for the plaintiff \$2,000 as counsel fees. On the said eleventh of November, both the parties (husband and wife) signed a paper reading thus: "We, the parties to the above-entitled action, having condoned each other's offenses, voluntarily abandon said action, and ask that the same be dismissed." At the hearing on the thirteenth of November, after affidavits on behalf of plaintiff's attorneys had been read, the paper above referred to was read, together with the affidavit of plaintiff, in which she stated that in October, 1882, she and her husband mutually condoned each other's alleged offenses, and ever since October 23d had been living and cohabiting together peaceably, quietly, and happily as man and wife, and intended to so continue for the remainder of their natural lives, and that she then and there, during trial and before final submission, abandoned the case, and asked that the same be dismissed. Thereupon the court, on the fifteenth of December, 1882, made an order awarding to said Sullivan and Whittemore \$1,000 as counsel fees; and on the ninth of January, 1883, the court rendered its judgment, in which, after adjudging that plaintiff had condoned and forgiven the alleged offenses of defendant, and abandoned the case, adjudged and decreed that the defendant pay to the plaintiff's attorneys, J. D. Sullivan and D. H. Whittemore, \$1,000 counsel fees, and that the action be dismissed.

That part of the decree which directed the payment of counsel fees was erroneous. On the twenty-third of October the alleged offenses of defendant were condoned, and both parties asked that the action be dismissed; therefore, so long as the condition which the law implies, viz., subsequent kindness, continued, the plaintiff had no cause

of action, or occasion for the service of counsel in that regard. When the husband and wife forgave and were forgiven, and abandoned their criminations and recriminations, the attorneys had but to gather up their briefs and retire. The court should at once have dismissed the case, and made no further order in it. *McCulloch v. Murphy*, 45 Ill. 258; *Newman v. Newman*, 69 Ill. 169; *Persons v. Persons*, 7 Humph. 183.

Section 137, Civil Code, authorizes the court to require, during the pendency of the action, the payment by the husband of any money necessary for the prosecution of the action. When the wife (plaintiff) in open court admits condonation, and asks that the action be dismissed, as she no longer has an action to be prosecuted, it is not necessary that any money be paid for its prosecution. As the above disposes of the case, we omit to express opinion on two other points presented, viz.: The effect, on the right to have counsel fees allowed, of an agreement between plaintiff and her attorney that the latter have as compensation for his services a share of the property ultimately recovered; and whether the order should have been that the amount be paid to the plaintiff in person, rather than to the attorneys.

There is on file in this case a certified copy of a paper filed after the case was heard in this court, purporting to be an order of the court below, from which it appears that, after the appeal was taken, the court below, in making such order, recited that the judgment from which the appeal was taken did not speak the truth, and corrected the judgment. In the judgment as thus attempted to be corrected, nothing appears regarding the payment of counsel fees; the portion of the judgment relating to counsel fees being omitted. In deciding this case we disregard this paper. A bill of exceptions comes up with the record, presenting some of the matters hereinbefore stated. If we were to consider the judgment as attempted to be amended, the appellant would be prevented from having the benefit of his exceptions. After a case has been appealed, we do not think the court below has power to so change the judgment appealed from as in effect to prevent the review of alleged errors brought up by bill of exceptions.

The judgment, so far as appealed from, is reversed.

We concur: ROSS, J.; THORNTON, J.

(2 Cal. Unrep. 491)

FRINK v. ROE and others. (No 8,879.)

Filed June 29, 1885.

1. POWER OF ATTORNEY—REVOCATION BY DEATH.

A power of attorney to convey becomes extinct by the death of the constituent, although the power be irrevocable, and no title passes by a deed subsequently made by the attorney.

2. POWER OF ATTORNEY—CONVEYANCE BY ATTORNEY IN PAYMENT OF HIS DEBTS.

Where the intention in executing a power of attorney was to give the attorney control of the property for his own benefit, he may convey the same in payment of his own debts.

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3. EVIDENCE—ADMISSIBILITY OF DECLARATIONS OF OWNER OF LAND.

Declarations of an owner of land in disparagement of his title are admissible in evidence against him, and all claiming under him, while the legal title remains in him; but such declarations are inadmissible where made by him after he has parted with his title.

Department 2. Appeal from superior court of the city and county of San Francisco.

E. A. & G. E. Lawrence, for appellant.

McAllister & Bergin and *T. B. Bishop*, for respondent.

THORNTON, J. The sale under the execution issued on the judgment in *Smith v. City of San Francisco* was regular, and passed all the title which the city had on the day of sale. The sheriff's deed passed such title to the purchaser, and such title came regularly by proper conveyances and vested in D. B. Rising, under whom both of the parties to this action claim. While Rising held the title, he executed to James H. Hodgdon a deed of release and quitclaim, bearing date thirtieth of March, 1853, which was recorded on the same day, by which, for a consideration of \$7,900, he conveyed to Hodgdon the parcel of land in controversy, together with other parcels. On the same day Hodgdon executed to Rising, for and in consideration of five dollars, paid by the latter to him, a letter of attorney, by which he constituted Rising his attorney in fact, "without any revocation or power of revocation" on the part of the constituent, and authorized the attorney so constituted to grant, bargain, and sell the land conveyed by the deed to Hodgdon, just above mentioned, and other lands just before conveyed to him, some of them by Rising, and others by Rising and Raphael Schoyer. Rising was by the same letter authorized to convey said land, when sold, to the purchaser.

For what reason and with what intent were those papers executed? Why were these lands conveyed to Hodgdon, and at the same time a power by contract for a valuable consideration taken back by the grantor from his grantee? These documents on their face suggest inquiry. They may have been made to assume the form in which they are presented for various purposes. It would be idle to say that they were executed without a definite purpose and intent. It is unnecessary to speculate or hazard conjectures as to what the purpose and intent were, as we have as to that the testimony of a witness who testifies clearly and distinctly as to the purpose and intent with which they were executed; and it may be added here that the testimony of this witness is without contradiction, and is the only evidence on the point. The witness referred to, Hiram C. Clark, states in his testimony that he was, prior to and during March, 1853, an attorney and counselor at law, practicing his profession in the city of San Francisco; that he drew the deed and the letter of attorney above mentioned, bearing date thirtieth of March, 1853, at the request of Rising; that he never saw Hodgdon until he came to execute the deed, which was done in his presence; that he was, during the period of time above mentioned, a notary public in the city aforesaid, and took the acknowl-

edgment of Hodgdon to the letter of attorney, and of Rising to the deed referred to. It may be stated here that these documents show that the acknowledgments of their execution appended to them were taken by Clark as notary. The witness further stated that he, at the time referred to above, was the attorney of Rising and Schoyer; that Rising alone consulted with him as to the transaction; that when Hodgdon called to execute and acknowledge the instruments he stated to him their contents; that Hodgdon sat down and made his signature, and he took his acknowledgment; that he was paid for his services in the business by Rising, Casselli & Co.; that Hodgdon paid Rising nothing in his presence; and that Rising told him at the time that Hodgdon was then a clerk for Rising, Casselli & Co. The further testimony of this witness we extract from the record. In making this extract we omit certain objections made by counsel for defendants, which are not in any sense important or material. The following is the testimony referred to:

“Question. In regard to the power of attorney, that was from Hodgdon to Rising, dated on the thirtieth of March; it is irrevocable in its character. I will ask you if you ever had any conversation with Mr. Rising or with Mr. Hodgdon, with reference to the preparation of that power of attorney? *Answer.* I had a conversation, and I think Mr. Rising asked my advice as to giving this power of attorney. Mr. Rising didn't profess to be a lawyer; he would ask me these questions and I would answer them. I gave him advice as to power of attorney. *Q.* Now, what transpired at that time? I want to get out all that transpired between you and him with reference to that, as near as you can. *A.* I looked upon it as a pretty important matter—conveying so much real estate to Mr. Hodgdon. It was an important transaction, and I remember of advising Mr. Rising to keep the power in his own hands, and he wanted to know what instrument to take back,—he was going to make the conveyance. *Q.* Take back from Mr. Hodgdon? *A.* From Mr. Hodgdon, for he was to manage the affair. *Q.* Mr. Rising was to manage the affair? *A.* Yes, that is what he told me,—to manage the matter; and then I told him that I could prepare, I thought, a power of attorney that would make him safe. *Q.* Safe in regard to what matter? *A.* Well, putting this title into Mr. Hodgdon's hands; he was conveying a good deal of this property, if I remember right, in that deed; and then he would like me to still draw some instrument by which he would be secured and still manage the property. *Q.* Be secure in the title? *A.* Yes, sir. *A.* Or secure in the ownership? *A.* Well, in his rights, he claimed he had a right. *Q.* Well, now, can you tell us what he represented to you as being his rights in the property after the conveyance was made to Mr. Hodgdon? I want to get at the bed-rock, if you can. *A.* It was a wish to manage the property,—to make sales; they were to convey and reconvey. I don't know; these conveyances were jumping around, and he wished still to retain control of the property; that is what he told me,—his precise language I don't remember. *Q.* Did he still retain control of the property after the conveyance? *A.* I could not answer that. *Q.* Will you state again with regard to what he wanted? *A.* Before you take that down— I don't know that this will be responsive. He claimed the management of the property. That would be the word I would use there. *Q.* At whose instance was this irrevocable power of attorney prepared—at your own, or that of Mr. Rising? *A.* It was at Mr. Rising's, as I stated; Mr. Rising ordered it to be done. *Q.* Did Mr. Rising consult you with reference to taking a reconveyance from Mr. Hodgdon of the property? *A.*

He wanted some—he wanted the property in his hands; that is what he said substantially. I don't give his exact language; that was precisely the idea he conveyed; then he left to me to retain that power. The power of attorney was drawn at my suggestion. Q. Did the question come up which would secure him the best,—a power of attorney, or deed of conveyance from Mr. Hodgdon back to him; not to be recorded? A. Yes; that was talked of. It was talked over, but it was left to me the kind of instrument which would protect his rights. Q. Left to you to draw an instrument which would protect his rights in the property? A. Yes, sir. Q. And those rights were the management and control of the property, was it? A. Yes, sir; he can make sales, and Schoyer makes sales. Q. Was it not at that time talked of by him that Mr. Hodgdon was about to leave the state? A. I have no recollection—he spoke of Mr. Hodgdon going away—no present recollection. Q. Do you know why a five-dollar consideration was put into the power of attorney? A. To make it a power of attorney coupled with an instrument. Q. That was the object? A. That was the object; yes."

It is clear from this testimony that the documents were drawn and executed in the form in which they are presented to us in the record, with a view to give Rising the control of the property, so that he might dispose of it in any mode he might desire. No doubt it was the intention to vest in Rising an interest which would fasten the power granted to him by the letter of attorney with such interest. This, the attorney stated, was his object in inserting the consideration of five dollars in the letter of attorney, and he so advised Rising. The means taken did not in law create such an interest, within the rule laid down in *Hunt v. Rousmanier*, 8 Wheat. 174, and *Barr v. Schroeder*, 32 Cal. 618, for the letter of attorney transferred no interest in the land mentioned in it to Rising. But the documents and the testimony show what was the intention of the parties,—that Rising was to have the exclusive power to dispose of and convey the land. This was what the parties, Hodgdon and Rising, wished to accomplish. The power to sell was purchased by Rising of Hodgdon for a valuable consideration. Under the circumstances it was a contract between Rising and Hodgdon that the former should have the exclusive and irrevocable right to sell the property described in the letter; and as it was intended to give Rising the sole control of the property, it invested him with a right to the proceeds of the sale. If the arrangement did not effect this, it was a mere idle formality. It appears that under this letter of attorney Rising, as the attorney of Hodgdon, and in his name, executed two deeds conveying the land in controversy. The first in point of time was executed to David S. Turner and Samuel Hort, on the tenth day of October, 1853, on which day the letter of attorney was duly recorded. The deed to Turner and Hort was recorded on the thirteenth of October, 1853. The second deed was executed to Rufus Wade, bore date the twenty-eighth of May, 1866, and was recorded on the thirty-first of same month.

The last-mentioned deed will be considered first. Hodgdon had departed this life in 1862. So far as regards the power to convey, this deed passed no title. The power granted by the letter of attor-

ney, though irrevocable, became extinct by the death of the constituent. The law is so ruled in the case of *Hunt v. Rousmanier*, *supra*, where the rule and the reasons of its adoption are fully stated. The power under consideration here, though irrevocable by the constituent during his life-time, is not one coupled with an interest, and therefore does not survive the author of it. It ceased upon his death. The claim of plaintiff to recover on the deed to Wade cannot be sustained. It appears that the deed to Turner and Hort was an assignment to them in trust for the benefit of the creditors of Rising, Casselli & Co., of which firm D. B. Rising was a member. It is argued that this deed is a nullity, because it was not made in accordance with the power, as the power did not authorize the attorney in fact, Rising, to sell and convey his property to pay his debts. Conceding this to be ordinarily correct, still as we have determined that the arrangement under which the letter of attorney was executed by Hodgdon to Rising was intended to give the latter the control of the property for his own benefit, we are of opinion that this rule has no application here; that Rising had the full power to sell to the trustees; and that his conveyance to them was valid to transfer the title to them. The plaintiff connected himself with Hort and Turner by proper mesne conveyances, and, in our judgment, through it was invested with title to the property in suit, if the defendants had notice of the agreement made between Hodgdon and Rising at the time of the execution of the deed of thirtieth March, 1853, by the latter to the former, and of the letter of attorney above spoken of, bearing date on same day. On this point we are of opinion that the deed and letter of attorney just above referred to, which were on record long before [Howard] in 1870, the grantor of defendants, purchased, together with the deed to Turner and Hort by Rising, under the power, which was also on record, were sufficient to put a purchaser from Hodgdon, or any one claiming under such purchaser, on inquiry as to the facts and circumstances under which such documents were executed.

The peculiarity of these papers would at once suggest an inquiry, to a person of ordinary prudence, why and for what purpose were they executed? It does not appear that any inquiry was made at all. It was assumed that the title was in the devisee of Hodgdon, and a deed was procured from such devisee, under which defendants endeavor to protect themselves. There are other circumstances which might have been discovered on inquiry, if it had been made. It would have been ascertained that Hodgdon left this state in 1853, went to the east, from which he never returned, and died in Philadelphia in 1862. During this period he paid no attention to the property, and acted as if he had no interest in it. After his death nothing was done in relation to the land in suit until 1870, when Howard, under whom defendants claim, bought it, among other parcels of land situate in the city of San Francisco, from the devisee of Hodgdon, and procured from her a conveyance of it. It does not appear that either

Howard, or any one claiming from him, ever made any inquiry as to the circumstances under which the deed to Hodgdon was executed by Rising, or the letter of attorney executed by Hodgdon to Rising. Under these circumstances the court is of opinion that Howard, and all those claiming under him, must be held to have had notice, when they took the deeds executed to them, of all the facts and circumstances, and the agreement under which the deed was executed under the letter of attorney by Rising to Turner and Hort, which deed was, in our opinion, valid, and transferred the title to them. The statute of frauds offers no difficulty in the case. The contract between Hodgdon and Rising became executed by the conveyance made to Turner and Hort in October, 1853, by Rising, under power from Hodgdon. After that time the statute of frauds could not be invoked by Hodgdon, or any one claiming it, even conceding, but not intending to hold, that the statute before that date would have been a bar to the specific execution of the contract referred to.

As the case goes back for a new trial, it is proper to pass on some other questions raised on the record. The plaintiff offered to prove by a witness certain oral declarations of Hodgdon, made in the month of April, 1853, in disparagement of his (Hodgdon's) title to the property involved herein. This offer was made by plaintiff when making out his case, and was renewed in rebuttal. They were ruled out on both occasions, and plaintiff excepted. The court committed no error in rejecting the offer when first made, for it did not then appear that the title had ever been in Hodgdon. But the defendants, in putting in their testimony, offered the deed of the thirtieth of March, 1853, executed by Rising to Hodgdon, by which the title was transferred to the latter. His declarations made after that time, while the legal title remained in him, in disparagement of his title, were admissible against him and all claiming under him. 1 Greenl. Ev. § 109; Code Civil Proc. § 1849. The legal title vested in him on March 30, 1853, and passed out of him by the deed executed by him through Rising under the letter of attorney to Turner and Hort, on the tenth day of October, 1853. The declarations made in 1859, after the last-mentioned date, were not admissible. Those made in April, 1853, were admissible, and the court erred in excluding them. *McFadden v. Wallace*, 38 Cal. 51; *McFadden v. Ellmaker*, 52 Cal. 348.

For the foregoing reasons the judgment is reversed, and the cause remanded for a new trial. Ordered accordingly.

We concur: SHARPSTEIN, J.; MYRICK, J.

(2 Cal. Unrep. 498)

BATH v. VALDEZ and others. (No. 9,938.)¹

Filed June 29, 1885.

TITLE—ADVERSE POSSESSION—EVIDENCE.

On a review of the evidence, *held*, that the plaintiff had not acquired title by adverse possession to the whole of the premises in dispute, and judgment affirmed.

Department 2. Appeal from superior court of the county of Los Angeles.

Brunson, Graves & Chapman, for appellant.

Bicknell & White, G. M. Holton, Howard & Roberts, and H. A. Barclay, for respondents.

MYRICK, J. Action to quiet title. The court below decreed that plaintiff was the owner of an undivided one-half of the premises, and that certain of the defendants were the owners of the other undivided one-half—one-twelfth each; and that plaintiff had not acquired the interest of the defendants by adverse possession. We are of opinion that the findings are supported by evidence; therefore, we look to the findings, and the conclusions of law, and decree, to determine if any error was committed by the court in making the decree.

In 1862 Julian Valdez had title to the premises as the common property of himself and his wife, Manuela. In 1863 Julian Valdez died intestate, leaving him surviving Manuela, his widow, and his mother, and several brothers and sisters, as his heirs. In April of that year the widow obtained letters of administration. In 1865 Manuela intermarried with one Chavez, and thereafter, in the same year, she and her then husband executed a deed of the premises to one Peppers, by which they remised, released, and quitclaimed "all that lot," describing a tract including the premises in controversy. Under this deed Peppers took and retained possession until, in July, 1872, she executed a grant, bargain, and sale deed to Burrows, and from Burrows the title comes, by mesne conveyance of grant, bargain, and sale, to plaintiff. Plaintiff's grantors were respectively in the undisturbed possession of the premises during the periods while they had title; they placed improvements on the property, received the rents, and had the entire enjoyment thereof. Plaintiff purchased in January, 1882, and this suit was commenced in October, 1882. The court also found—

"That the said plaintiff, his grantors, ancestors, and predecessors, from the fourth of October, 1865, have received all the rents, issues, and profits of the premises, paid all taxes that have been imposed thereon, and occupied the same, and that neither the said plaintiff nor his grantors or ancestors or predecessors, or any of them, ever gave any notice, actual or otherwise, to the defendants, or any of them, that he or they, or any of them, intended to or did or were claiming and holding the said premises, or any part thereof, adverse to the said Jose E., Brigido, Vincente, Juan, Felipe, and Maria de Los Angeles Valdez, and Guadalupe V. de Rocha, or either or any of them; nor was the said plaintiff, or the said Burrows or Roques, or the said Dassaud, or the said Goodwin, or any or either of them, ever heard to make or assert any

¹ Reversed in banc. See 11 Pac. 724, 70 Cal. 350.

claim to the land in controversy adverse to the said defendants Valdez or Rocha, or any of them, or under whom they claim, prior to the commencement of this action."

From the marriage of the widow of Julian Valdez, in 1865, until 1882, nothing was done in the administration of the Valdez estate; but in 1882 Brigido Valdez, one of the brothers of the deceased, obtained letters, and such proceedings were had that in 1883, after the commencement of this action, distribution of the property was made by the superior court, sitting in probate,—one-half to Burrows, grantee of Manuela, and the other half to brothers and sisters of the deceased, one-twelfth each; the mother and one brother having died in the mean time.

The court below based its decree on two propositions, viz.: *First*, the plaintiff had not acquired the property, as against the heirs of Julian Valdez, by virtue of the statute of limitations; and, *second*, he was estopped by the decree of distribution in probate from asserting that the Valdez heirs had no title.

The first proposition alone is sufficient for the decision of this case. The widow of Julian Valdez, owning the undivided one-half of the property as survivor of the community, executed a quitclaim deed. Her grantee entered under that deed, and although that grantee and her successors in interest down to plaintiff have been in possession enjoying the property, (the later holders believing that they owned it entire,) yet they never "gave any notice, actual or otherwise, to the defendants, or any of them, that he or they, or any of them, [plaintiff and his predecessors,] intended to or did, or were claiming and holding the said premises, or any part thereof, adverse to the said Valdez heirs." With such facts it cannot be successfully asserted that the possession of plaintiff and his grantors was adverse to such heirs. This case is quite different from *Unger v. Mooney*, 63 Cal. 586.

We have examined the various points presented by appellant, and find no material error in any matter affecting the judgment.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(67 Cal. 182)

BURKE v. EDGAR. (No. 9,981.)

Filed June 29, 1885.

1. MANDAMUS—SALARY OF DEPUTY COUNTY CLERK OF SAN FRANCISCO.

A petitioner proceeding by *mandamus* to compel the auditor of the city and county of San Francisco to allow his claim for salary as deputy county clerk, must allege that he was appointed or assigned the position of court-room or register clerk, and an allegation that he acted in such capacity is not enough.

2. DE FACTO OFFICER—RIGHT TO SALARY.

De facto public officers are not entitled to recover compensation or salary annexed to the office, as such salary is incidental to the title to the office, and not to its occupation or exercise.

In bank. Appeal from superior court of the city and county of San Francisco.

Dunne & Davidson and Joseph J. Dunne, for appellant.

John L. Love, for respondent.

THORNTON, J. Application for a writ of mandate to be issued to defendant, as auditor of the city and county of San Francisco, to compel him as such auditor to allow the claims of petitioner and his assignors for balance of salaries alleged to be due them as deputy-clerks of the clerk of the city and county above mentioned. It is alleged of some of these deputies that they severally performed services as deputy in the capacity of court-room clerk in a department of the superior court of the city and county aforesaid, and of others of them the same allegation is made of them severally as register clerk. It appears that each of them has received from the auditor a warrant for \$150, in discharge of his salary as deputy, which has been regularly paid by the treasurer of the said city and county. It is claimed, and the court below so held, that the salary of a court-room or register clerk is fixed by law at \$175 per month. It should be stated here that the salary of the other deputies of the county clerk is fixed at \$150 per month or less, and that the claim in question in this case is for the difference of \$25 per month between the \$150 paid as above stated, and the \$175 per month at which the salary was fixed.

We think that the salary of a court-room and of a register clerk is fixed by the acts of the legislature passed on the thirteenth of February, 1880, and April 2, 1880, at \$175 per month. St. 1880, 5, 20; see, also, Act February 5, 1872, (St. 1871-1872, 76.) In the view taken of this case, the constitutionality of the acts of 1880, above cited, may be conceded without deciding the point. It is nowhere averred, nor is it found, that the petitioner or his assignors were appointed or assigned to the position of court-room or register clerks. The act of April 5, 1880, authorizes the county clerk to assign to a deputy duties in, or in connection with, the superior court of his county, or city and county. The finding that each of the parties referred to acted in the capacity and only performed services as the court-room clerk of a department, or as the register clerk of a department, of the superior court, is not a finding that they and each of them were assigned. It is at most a finding of evidence, and not of the fact of assignment. Facts and not evidence should be found. Especially should the fact of assignment be found, where the evidence as it appears in the finding is consistent with the fact that they acted in such capacity, and performed the services stated without any such assignment. It is consistent with the finding as made that each of the parties were *de facto* officers, and it is well settled in this state that a *de facto* officer cannot recover the compensation or salary annexed to such office; that such salary is "incident to the title to the office, and not to its occupation and exercise." *Dorsey v. Smyth*, 28 Cal. 21; *Stratton v. Oulton*, Id. 44; *People v. Potter*, 63 Cal. 127.

Conceding that the presumption invoked by appellant, stated in section 1963, sub. 14, Code Civil Proc., applies here, still the fact of assignment should be found. But we are of opinion that such presumption does not apply to the case of an officer prosecuting an action to recover his salary. In such case he must establish his title by proof of an appointment made as required by law. See cases just above referred to, and *People v. Hopson*, 1 Denio, 579, and cases there cited. This is not a case in which the judgment should be reversed, and the cause remanded for a new trial, for want of a finding upon a material issue, as no issue was joined on the main question in the cause, viz., that of an assignment by the county clerk to the positions above referred to. The views above expressed are conclusive of the case, and it is therefore unnecessary to pass on the other questions discussed herein.

The judgment and order should be affirmed; and it is ordered accordingly.

We concur: SHARPSTEIN, J.; ROSS, J.; MYRICK, J.; MCKINSTRY, J.

KASTEN v. PAXTON and others. (No. 9,900.)

Filed June 30, 1885.

EVIDENCE HELD INSUFFICIENT TO JUSTIFY DECISION.

Department 2. Appeal from superior court of the county of Los Angeles.

R. M. Widney, for appellants.

Thos. B. Brown and A. W. Hutton, for respondent.

SHARPSTEIN, J. The court finds that the plaintiff deposited with the defendant between July 21, 1878, and April 9, 1882, the sum of \$15,697.82; that plaintiff has drawn on account of said deposit \$10,872.95, leaving a balance of \$4,794.87 due him on said account, for which judgment was entered in his favor. Appellants insist that the evidence is insufficient to justify the decision. After a careful examination of the evidence we have arrived at that conclusion. The evidence of the plaintiff shows that he kept no account of his transactions, but was under the impression that the state of his account with them was quite different from what their books showed it to be. He was giving them orders to buy and sell stocks for him, and when he found that he had thereby lost all the money he had in their hands, and more, too, he was very much disappointed. But he gave them his notes for the balance, which, by the account rendered to him by them, appeared to be due to them. On the one side we have the bare impressions of the plaintiff, and on the other the books of a business firm, corroborated by the person who kept them, and through whom the business of buying and selling stocks for plaintiff was transacted. There is no substantial conflict in the evidence, because the

plaintiff's evidence lacks certitude. Independently of the account kept by defendants, he does not know how many orders he gave for the purchase and sale of stocks. In no particular does he attempt to impeach that account. His general impression is that it is not correct.

Judgment and order reversed.

We concur: MYRICK, J.; THORNTON, J.

SUPREME COURT OF OREGON.

(12 Or. 349)

POPPLETON v. NELSON and others.

Filed June 10, 1885

USURY—NATURE OF PROOF REQUIRED.

To establish the defense of usury, the court requires clear and cogent proof, and will not accept vague inferences, or mere probabilities, or resort to conjectures, to aid the defense.

Appeal from Yam Hill county.

James McCain and *W. D. Fenton*, for respondents.

A. M. Laughery, for appellants.

LORD, J. This is a suit in equity to foreclose a mortgage. The defense is usury. This is the main question involved, and is one of fact, which needs to be proved by clear and satisfactory evidence. As the defense of usury involves a forfeiture, it is considered as an unconscionable defense, and a strict one. To establish such a defense the court requires clear and cogent proof, and will not accept vague inferences, or mere probabilities, or resort to conjectures, to aid the defense. The burden of proof is on the defense, and he must sustain his allegations by a clear preponderance of evidence. "He is impeaching his own solemn obligations under seal, and must establish the facts necessary to constitute it, beyond reasonable doubt. It is not sufficient to show an even balance of testimony; there must be a clear preponderance. Usury is a defense not favored in equity; the old consequences, the forfeiture of the whole debt, was so severe a penalty that it was considered unconscientious." *ZABRISKIE*, chancellor, in *Conover v. Van Mater*, 18 N. J. Eq. 487. "The burden of proof," said *DEPUE, J.*, "is on the defense, and the defense cannot be supported by probabilities or suspicions, however strong. If allowed to prevail, it must be supported by such preponderance of evidence as establishes the truth of the allegations on which it depends, beyond a reasonable doubt." *Taylor v. Morris*, 22 N. J. Eq. 612; *Brolasky v. Miller*, 8 N. J. Eq. 789; *New Jersey Pat. T. Co. v. Turner*, 14 N. J. Eq. 326. And again he says: "If the defense of usury should ever be sustained upon the uncorroborated testimony of the party by whom the security was made, the testimony should be in all respects unexceptionable." See, also, 1 *Jones, Mortg.* § 623; *Tyler, Usury*, 122, 470, 472. These references are sufficient to show how the defense of usury is regarded in equity, and the strictness of proof required to support it. As, by our statute, such a defense involves, by way of penalty, the loss of the debt, the proof of it ought certainly to be clear and satisfactory. After careful examination of the evidence, we are satisfied the charge of usury is not sustained. There is no clear and direct proof; and the inferences and conjectures sought to be drawn from some of the facts are too unreliable on which to base a conclusion.

The decree of the court below must be affirmed.

SUPREME COURT OF UTAH.

(4 Utah, 121)

BURROWS v. GUEST.

Filed June 20, 1885.

REHEARING GRANTED.

Petition for a rehearing.

Zera Snow, for appellant.

Baskin & Van Horne, for respondent.

ZANE, C. J. This is a petition for a rehearing, from which it appears that the plaintiff filed his complaint for trespass in the district court, which the defendant answered; that the issues were tried by a jury and a verdict rendered for plaintiff; that judgment was entered thereon, from which defendant appealed to this court; that the appeal was heard and decided by a divided court, when composed of the predecessors of its present members, and that no opinion has been filed.

In view of these statements, and of the fact that the exceptions present important questions, which we are not prepared to decide as now advised, we are of the opinion a rehearing ought to be granted. The court so orders.

(4 Utah, 177)

Ex parte LOWRIE.

Filed July 10, 1885.

IMPRISONMENT OF INDICTED PERSON AFTER FAILURE TO TRY—CONSTRUCTION OF STATUTE—LAWS UTAH 1878, P. 162.

Section 465 of the criminal procedure act does not deprive the court of its discretion as to the release upon their own recognizances of indicted persons after a term of court has passed, during which they might have been tried.

On petition for discharge on writ of *habeas corpus*.

E. B. Critchlow, for petitioner.

W. H. Dickson, for the People.

BOREMAN, J. It appears that on or about the fifteenth November, 1884, the petitioner was arrested upon a criminal complaint, charging him with the crime of enticing females of previous chaste character into a house of prostitution. After hearing, he was by the magistrate committed to await the action of the grand jury, and in default of bail was sent to jail. By the next grand jury, on twenty-first February, 1885, he was indicted, and warrant issued thereon. On the twenty-seventh February he was arraigned, and pleaded "not guilty," and demanded to be put immediately upon trial. The cause was continued to the fourteenth day of March following, but was not reached when the day for the trial of civil cases arrived. The civil cases occupied all the residue of the February term. At the April term following, the trial of the case was set for the twenty-first April. On

last-named day, the counsel for the people asked and obtained continuance until the twenty-ninth day of April, on account of the absence of witnesses. The cause was reached on fourth May, and again the counsel for the people moved for a further continuance on the ground of the absence of witnesses. The petitioner objected, and asked that the cause be set for trial at a later date in the same (April) term. The court granted the motion of the counsel for the people. The petitioner then asked to be discharged upon his own recognizance, but it was refused. His bail, however, was reduced to \$500. The matter now comes to this court upon a writ of *habeas corpus*, for the discharge of the petitioner on his own undertaking of bail, to appear at the next term of the Third district court.

The petition alleges that certain criminal cases were tried at the February term, 1885, after his indictment; that five of the six cases tried were those where the defendants were at large on bail. At the hearing it appeared that these cases had been called and regularly set for trial before the indictment of the petitioner had been filed. It was admitted at the hearing, also, that the prosecuting officers had been guilty of no negligence.

In order to understand fully this case, it is proper to refer to two sections of the criminal procedure act, (Laws Utah 1878, p. 162:)

"Sec. 464. The court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed, in the following cases: (1) (Has reference to failure to indict, and is not material on this point.) (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial at the next term of the court in which the indictment is triable, after it is found.

"Sec. 465. If the defendant is not indicted or tried, as provided in the last section, and sufficient reason therefor is shown, the court may order the action to be continued from term to term, and in the mean time may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued."

The question at issue hinges upon the construction to be given to the word *may* in the latter part of said section 465; the petitioner claiming that it should be construed *shall*, so that the section should read, "and in the mean time *shall* discharge the defendant," etc.

The supreme court of the United States states the rule in cases of this character to be that where power is given to public officers—in language something of the same kind as this—the language used, though permissive in power, is in fact peremptory whenever the public interests or individual rights require its exercise. *Supervisors v. U. S.* 4 Wall. 446.

Our attention has not been called to any public interest or sound public policy that would justify the court in allowing the petitioner to go out upon his own recognizance. Nor can we see wherein the petitioner's individual rights have been trespassed upon. True, it is extremely grievous to remain in jail during these several months awaiting trial, but it is a necessity that the best interests of the public

require. There is no pretense that the action of the court was in any way arbitrary or oppressive. The counsel for the people are not shown to have acted otherwise than with diligence, and for the best interests of the public. There has been no unnecessary delay. The crowded condition of the court calendar no doubt accounts in some measure for the delay, but even without this consideration we do not think the postponement was unreasonable. There is no claim that the court was not authorized, from the showing made, to grant the continuance. *Ex parte Larkin*, 11 Nev. 90.

If the construction contended for by the petitioner be adopted, the result would be that in every case, (excepting in capital cases where the proof of guilt is evident, or the presumption thereof great,) no matter how grave the charge, nor how plain and urgent the grounds for postponement, yet, if the court should continue the cause, on the application of the counsel for the people, beyond the term following that in which the indictment was found, the defendant would be entitled to discharge upon his own undertaking of bail. This would, in very many cases, be equivalent to a dismissal of the action. We do not think that we are warranted in placing such a construction upon the statute, when the plain reading is to the contrary, and the evident intent of the legislature was to the contrary. The purpose of the statute, no doubt, was to give the court express authority to discharge a defendant upon his own recognizance, if, in the exercise of a wise discretion, it was deemed proper. We are requested, however, that in case we hold that the language leaves the discharge discretionary with the court, we should exercise that discretion, and grant the petitioner a discharge upon his own undertaking of bail. The district court, which was more familiar with the case than this court, declined so to do. No new light has been given us to guide us to a different conclusion.

The discharge of the petitioner is denied, and he is remanded to the custody of the marshal.

ZANE, C. J., and POWERS, J., concur.

SUPREME COURT OF ARIZONA.

(2 Ariz. 8)

DOWLING v. HUNT.

Filed July 2, 1885.

PLEADING—RECOVERY UPON BANK CHECK—COMPLAINT—NECESSARY AVERMENT.

In order to recover from a drawer the amount of a bank check or bill of exchange, it is necessary to aver in the complaint either a demand upon him and notice to him of non-payment, or else facts sufficient in excuse of a failure of such demand and notice.

Appeal from district court, Pima county.

Haynes & Styles, for respondent.

J. A. Anderson, for appellant.

PINNEY, J. This action was brought to recover upon a bank check alleged to have been given by appellant to respondent on the Guaranty Trust Bank of Philadelphia, about the month of March, 1883. The complaint alleges that the check was presented for payment about April 1, 1883, and that payment was refused by the bank. Appellant being a non-resident, and the complaint alleging that he has property in this territory, the action is brought here. There was no appearance in the court below on the part of defendant. Judgment was taken by default, and the case is brought here upon the judgment roll.

It is complained by counsel for appellant that the complaint fails to state a cause of action, for the reason that the complaint fails to allege notice to the drawer of presentment and non-payment. Under our practice, if the complaint fails to state a cause of action, a recovery and judgment cannot be sustained. The giving of a check on a bank transfers at once the amount of funds called for by the check from the drawer to the drawee, when the drawer has funds at the bank, and if the bank refuses to pay for any cause, the drawer is entitled to notice, so he may inquire into the cause of such refusal.

In a complaint against the drawer of a bank check or bill of exchange, so called, it is necessary to aver either demand, and notice to the drawer of non-payment, or such facts as would excuse demand and notice. *Shultz v. Depuy*, 3 Abb. Pr. 252.

We are of the opinion that the complaint fails to allege facts sufficient to constitute a cause of action, and for this reason the judgment will be reversed and cause remanded.

HOWARD, C. J., and FITZGERALD, J., concur.

SUPREME COURT OF OREGON.

(12 Or. 374)

CITY OF SALEM CO. v. SALEM FLOURING-MILLS CO.

Filed June 19, 1885.

WATER-RIGHTS—INJUNCTION.

Action to enjoin appellant from the construction of a dam in a creek, in the water of which the two parties litigant had equal rights.

Appeal from Marion county.

Geo. H. Williams and Shaw & Burnett, for appellant.

McDougall & Bower and Til. Ford, for respondents.

THAYER, J. This is an appeal from a decree of the circuit court for the county of Marion, rendered in favor of the respondent and against the appellant, in a suit commenced in that court by the respondent to enjoin the appellant from the construction of a certain dam upon what is known as Mill creek, in the city of Salem. The parties are both private corporations organized under the laws of the state of Oregon for the purpose of operating mills and manufacturing flour, and doing a general milling business. The respondent alleged in its complaint that it owned and operated two large flouring-mills run by water-power supplied through the channel of Mill creek, running among other places through the city of Salem, until it reached a point near said mills where, through a flume, it supplied them with water by which they were operated; that respondent was entitled to one-half the water that ran in Mill creek from natural and artificial supply; that it had the right to use and enjoy one-half the waters flowing in said creek, and to make sales of water thereon, and to erect dams upon the same, and to erect, build, and maintain a dam, at a point known as the "bend" of said creek, at Waller's claim, in said city of Salem, in order to give water to the appellant, whose race entered said creek immediately above the point named for said dam, and that said appellant was entitled to have flow through said race, and from Mill creek, one-half the natural flow therein, and what water had heretofore been turned therein from the Santiam river; that the respondent had the right to maintain and repair such dam, and so construct and maintain the same as to cause a fair division of the water aforesaid in two equal moieties between the two parties; that for a period of over 10 years a dam had been maintained at said point at the bend of said Mill creek, in order to give, and was giving, the appellant one-half of said water as aforesaid; that said appellant, on or about the thirteenth day of July, 1883, tore away said dam without any good cause, and against the will or consent of the respondent, and against its remonstrance built with heavy lumber, bolts, and planks another dam at the same point, but higher than the former dam, and so constructed the same that the appellant thereby got, or would have got, more than half the water flowing down

Mill creek, to-wit, about two-thirds thereof, to the injury, etc.; that the respondent, within the then last five days, demanded from the appellant its removal, and, after its refusal to remove the same, tore out the central portion of said dam, and commenced work to build another and proper dam instead thereof, with a view of dividing the water equally between said corporations, of which appellant had notice; that the appellant obstructed the respondent and its employes from proceeding with said work, and wrongfully took possession and control of the land adjoining such dam, and the channel of the stream, and had commenced to erect and build a dam of a permanent character, and strongly constructed, similar to the one already torn away, but of such a construction that the appellant will get about two-thirds of the water coming down the channel of Mill creek as aforesaid, to which it was not entitled. And the respondent charged that, unless the appellant was enjoined from further proceeding with the building of such dam, a permanent, irreparable injury would be done to the respondent, and it would not be able to run its mills as they were wont, and as respondent had a right to have them run, and that a great loss and damage would be done to the respondent if the appellant was not so enjoined from building and erecting such dam that it was engaged in so wrongfully erecting against the remonstrance of the respondent, and in violation of its rights; that respondent had no plain, speedy, and adequate remedy at law. Wherefore, respondent prayed for a decree of said court restraining the appellant, and its servant or servants, from proceeding further with the erection of said dam, or interfering in any way with the respondent or its servants in the erection of a proper dam as above set forth, and costs and disbursements of the suit.

The appellant denied in its answer that it was only entitled to have flow through said race one-half the natural flow of water in said creek, and what had been turned therein from the Santiam river; but averred that it was entitled to have flow into and through said race one-half of the water as it had theretofore flowed in said creek, and also one-half of the water in said creek as it might thereafter flow or be made to flow, including all water from the Santiam river, as well as the natural flow of the said creek; denied that the respondent had the right to maintain or repair said dam, or any dam, upon or across said creek, or to construct or maintain the same for any purpose, and denied that the dam theretofore existing at the said bend of Mill creek, gave, or was giving, to the appellant one-half of the water theretofore flowing through said creek; denied tearing away the old dam without any good cause, or against the will or consent of the respondent, or that against its remonstrance it built another dam at the same point, or that it constructed any such dam so that it got or would have received more than one-half of the water flowing down Mill creek; and denied all injury and damage alleged in the complaint. Averred that the dam referred to in the complaint was an

old, decayed, and leaky dam, and did not turn one-half of the water flowing to it into the race, so as to give appellant the use of one-half of the water flowing in said creek; that appellant proposed to join with respondent in the construction of a new dam in place of said old one, but that the latter refused, and that thereupon the appellant removed the old dam, and, with the knowledge and consent of respondent, erected a new, good, and substantial dam in place thereof, which it claimed was constructed so as to divide the waters of said creek equally between the parties. Denied that the respondent demanded the removal of the new dam, and averred that it secretly, and in the night-time, destroyed it, and thereby prevented the waters from going to appellant's mill; denied that the respondent commenced the construction of another dam with the view of dividing said waters equally; denied that it obstructed respondent from proceeding with said work, and alleged that the respondent pretended to do some work near said dam for the purpose of harassing appellant; admitted that another substantial dam had been erected in place of the one torn away by respondent, but denied that by means of it appellant would get more than one-half of the water; averred that the new dam was dividing the water equally between the parties; and denied that any injury would be done the respondent by means of the said dam, or that it would not be able to use its mills as they were wont, or as it had the right, to have them run. The appellant also, by way of counter-claim, alleged that on the seventeenth day of December, 1856, the legislative assembly of the territory of Oregon incorporated the Willamette Woolen Manufacturing Company, with power to bring water from the Santiam river to any place or places in or near Salem, through the channel or valley of Mill creek, and with power to enter upon lands, and also said creek, and to do all things proper and suitable for the safe, direct, and economical conveyance of the water aforesaid. Said corporation was to have exclusive right to the hydraulic powers and privileges created by water taken by it from the Santiam river, and the right to rent and sell the same, or any portion thereof, as it might deem expedient; that on the eleventh day of April, 1870, said corporation executed a deed to the said Salem Flouring-mills Company for certain real estate, mill machinery, flumes, dwelling-houses, wharf, and water-power, with their appurtenances, as therein described. Said deed contains the following covenants and agreements between the parties thereto:

"And the said parties hereto mutually specially covenant and agree unto each other, their successors and assigns, and this covenant shall be construed to run with the title to said premises, as follows, to-wit: That the said S. F. M. Co. shall be entitled to have the Santiam water, which is introduced to Salem by said W. W. M. Co., except the water-right heretofore granted to the state of Oregon by contract; divided into two equal parts, and that one-half of the same shall flow, and be conducted by, the race now in use, to the premises herein granted to the party of the second part, and the other half thereof shall flow down the natural channel of Mill creek, or through such other chan-

nel as may be provided; said division of said Santiam water shall be made at or near the dam on the land-claim of A. F. Waller and wife, where the race running to the oil-mill is taken out of Mill creek; that said S. F. M. Co. shall be entitled to the use and flowage of the natural water of said Mill creek to the same extent, and in the same manner, as the said W. W. M. Co. is now entitled, but at no time shall said party of the second part draw, or cause to flow to their works, more than one-half of said natural flow of Mill creek; and it is further covenanted by and between the parties hereto, their successors and assigns, that said S. F. M. Co. shall pay one-sixth of the expense, or do one-sixth of the labor, and furnish one-sixth of the material, necessary to maintain in full use and repair the head-race and gates on or near the Santiam river, now owned and used by said W. W. M. Co. for introducing said Santiam water to Salem; also maintain the dam on said Waller claim; and said S. F. M. Co. further agree to pay one-sixth of the expense, or do one-sixth of the work, of clearing out the channel of Mill creek, and enlarging the said head-race and gates, in case the owners of four of the six water-powers of Salem shall in future decide to enlarge the flowage of water from said Santiam river to Salem, aforesaid. And the said S. F. M. Co., their successors and assigns, shall pay one-sixth of all damages caused, or to be paid, on account of maintaining, continuing, or enlarging said head-race, works, or the flowage of said waters from the Santiam river to Salem; and it is further covenanted and agreed that said W. W. M. Co., its successors and assigns, shall keep up, or cause to be kept up, the necessary works and improvements to secure the usual flow of the Santiam water through their race and head-gates near the Santiam river to Salem, at all reasonable times, inevitable accidents excepted, and shall be liable to pay five-sixths of the expense thereof, and the said S. F. M. Co. shall be liable to pay the remaining one-sixth of the expense thereof."

That appellant, by authority of the Willamette Woolen Manufacturing Company, proceeded to construct a new dam in place of the old one, after requesting respondent to join in the construction thereof, but before putting up the dam it requested the respondent to examine the plan of the proposed new dam, and its mode of construction, so as to be satisfied that it would fairly and equally divide the water between the parties, and thereupon the respondent sent its engineers, who, with the engineers appointed by the appellant, examined the plans and mode of building said dam, and agreed that it would be a dam when completed that would equally and fairly divide the water; that, after removing the old dam, the appellant constructed on the site of it the new one, according to the plans and specifications agreed to by said engineers; that soon after, as before mentioned, the respondent destroyed it, and wantonly and maliciously destroyed the timbers and lumber of which it was constructed; that thereupon the appellant, by authority of the W. W. M. Co., erected the new one; that just before its completion the respondent, by false representations, obtained from the county judge of Marion county an injunction to restrain appellant from completing it, and thereupon the W. W. M. Co. completed it; that the object and purpose of the respondent in its proceedings were to prevent appellant from having the use of one-half of the water; that it had machinery and mills of great value, wholly depending upon said water for their operative power, which, if the water were diverted, would be rendered of little or no value.

After alleging other grievances committed by the respondent, the appellant prayed an injunction against the respondent. A reply was filed on the part of the respondent to the new matter set forth in the answer, in which the respondent admitted the incorporation of the Willamette Woolen Manufacturing Company, as alleged in said answer, but denied that it executed a deed to appellant with covenants as set forth therein, except as especially set out in said reply, in a deed of conveyance of the eleventh day of April, 1870, attached thereto and marked Exhibit A, but denied specifically every other allegation of such new matter. The deed of which said Exhibit A is alleged to be a copy, is the deed of April 11, 1870, referred to in appellant's answer, and contains the following additional covenant, relating to the grant of the water-right in the water flowing in said creek, viz.:

"And it is covenanted and agreed that the Salem Flouring-mills Company shall have the right to construct a waste-gate through the levee, near the creek and block No. 36, or through the flume above the long bridge, so as to discharge all or any part of the water belonging to said Salem Flouring-mills Company into the bed of South Mill creek, as the convenience of said party of the second part may require. And it is further understood and agreed that, in case any time hereafter said Willamette Woolen Manufacturing Company shall desire to introduce Santiam water to Salem for the purpose of watering the city, they shall have the privilege of diverting a sufficient amount of water from Mill creek, above Salem, for such purpose: provided, always, that they introduce and cause to flow into the channel of said Mill creek a sufficient amount of Santiam water, additional to what is used for milling purposes, as will make said mill-powers at Salem as good as before the use of any part thereof, for watering said city. And in case said Salem Flouring-mills Company shall desire to take a sixth part or interest in said project of watering said city of Salem, they shall be entitled to do so, by paying one-sixth part of the cost of said water-works, and paying one-sixth of all expenses thereof at the time when the same are constructed."

These are the substantial issues in the case. There were many charges of bad faith, and criminations and recriminations made, but they do not affect the main points. The pleadings were very extensive, though the issues tendered by them may, taken all together, be resolved into a simple question of controversy. Each of the parties had flouring-mills; each required the water that flowed down Mill creek to operate them; and each was confessedly entitled to one-half the water thereof. The appellant, in order to secure a flow of the water to its mills, was compelled to have a dam across the creek at a point below and near the mouth of its race. Its right to a dam is conceded, and the point of its location had, long prior to the time of the commencement to build it, been selected. The condition of the old dam as to decay, and being out of repair, is made an issue in the case, but certainly not a very important one, as the covenant in the said deed of April 11, 1870, expressly required the appellant to maintain the dam. The appellant alone was interested in keeping it up, and if it built a new one every six months, the respondent was not affected at all. The respondent was only entitled to one-half the

water, and, without the dam, it would get all of it. It was necessary, therefore, for the appellant, as well as obligatory upon it, to have a dam, and, unless the building of it in some way interfered with the respondent's getting its half of the water, the latter had no cause of complaint. The pleadings show that the appellant had authority to build the dam, subject only to the restriction that it should be built on the site on Waller's claim where the old dam was situated, on the said eleventh day of April, 1870; that is, the covenant to maintain the dam—the old dam—implied the right and imposed the obligation upon the appellant to rebuild it, otherwise it could not be maintained. The maintenance of the dam would probably imply that, in the event of its having to be rebuilt, it should be built on the same spot. This would be the strongest construction that could be claimed against the appellant. The height of the dam, and the manner of constructing it, are, so far as appears from the pleadings, unrestricted. The appellant is limited by the terms of the covenant as to the amount of water it is entitled to; that is, it is entitled "to have the Santiam water which is introduced to Salem by said W. W. M. Co., except the water-right heretofore [theretofore] granted to the state of Oregon by contract, divided into two equal parts, and that one-half of the same shall flow and be conducted by the race now [then] in use to the premises herein [therein] granted to the party of the second part, and the other half thereof shall flow down in the natural channel of Mill creek, or through such other channels as may [might] be provided." As to the water naturally flowing in said creek, the appellant is, by said covenant, restricted as follows:

"That said Salem Flouring-mills Company shall be entitled to the use and flowage of the natural water of said Mill creek to the same extent and in the same manner as the said Willamette Woolen Manufacturing Company is now [then] entitled, but at no time shall said party of the second part draw or cause to flow to their works more than one-half of said natural flow of Mill creek."

It may be inferred from the pleadings, and the proofs show, that the respondent, since the execution of the said deed of April 11, 1870, has succeeded to the rights of the said Willamette Woolen Manufacturing Company in said water, and occupies the relation to the appellant of a purchaser of those rights from said woolen company under a purchase thereof subsequent to the execution of that deed. It may therefore be deduced from the pleadings alone that the respondent had the right to have one-half of the water that flowed in Mill creek, including the water from the Santiam river, and that which ran naturally in said creek, "flow down the natural channel of Mill creek, or through such other channels as may be provided," subject to the water-rights granted to the state, as referred to in said covenant, and that the appellant had the right to have the other half thereof turned into its race, and that it had the authority and was compelled, at its own expense, to maintain the dam on Waller's claim

that existed on April 11, 1870, and that the maintenance of the dam implied the right to rebuild it whenever in its discretion the exigency demanded it. I am satisfied that a careful reading of the covenants in the said deed of April 11, 1870, will convince any one that the conclusion above suggested is the only proper one that can be drawn therefrom, and I am not able to discover why the agents of the respondent need to have been exercised on account of the building of the dam in controversy by the appellant. The right to build a dam at the point where this dam was located, and to turn the water into the appellant's race, we may infer from the pleadings was secured from Waller, and if the right granted for that purpose did not authorize the kind of dam the appellant constructed, then Waller, or his successors in interest, have a right to complain, but no one else has unless he can show that his vested rights are thereby injuriously affected; and I do not understand that the respondent claims or has attempted to show that it has succeeded to Waller's residuary interest in the claim upon which the dam was built.

It is, however, claimed by the respondent that the character of the dam the appellant was constructing when the suit was commenced, would not enable the water to be divided equally; but that would be the misfortune of the appellant. Its covenant limited it to the use of one-half of the water, and it would have no right to take more under any circumstances; if it did, it would render itself liable to damages, and to be enjoined from so doing. The respondent had no right to dictate the kind of dam the appellant should construct, but it had the right to object to its taking more than its half of the water. The appellant had bound itself by its covenant not to do so. "That the Salem Flouring-mills Co. shall be entitled to have the Santiam water," etc., "divided into two equal parts, and that one-half the same shall flow and be conducted by the race now in use to the premises herein granted to the party of the second part, and the other half thereof shall flow down in the natural channel of Mill creek, or through such other channel as may be provided." "That said Salem Flouring-mills Co. shall be entitled to the use and flowage of the natural water of said Mill creek," etc., "but at no time shall said party of the second part draw or cause to flow to their works more than one-half of the said natural flow of Mill creek," is the language of that instrument. When the appellant turns into its race more than one-half of the water flowing in said creek, then the rights of the respondent are invaded, and if it should threaten to do that, and there was a well-grounded apprehension that it would carry the threat into execution, a court of equity might interfere to prevent it. But the respondent has no right to complain about the dam, though it were built 18 feet high, and diagonally across the stream, unless it could show that it would necessarily cause to flow into said race more than half of said water. The dam does not divide the water.

It creates a head so as to enable the appellant to turn into its race its portion of it. The race might not be of sufficient capacity to receive half the water; then how would the dam cause the respondent injury? It commenced its suit prematurely. The appellant had not violated its covenant not to take more than half the water, nor threatened to, and respondent's rights were not affected nor jeopardized. The most that can be said against the dam is that the plan of it is such as will render it inconvenient to divide the water accurately, but the appellant will necessarily be the sufferer from that circumstance. If it takes more than half the water in any event, it will do so at its peril. Besides, there are no facts alleged in the complaint showing why the dam in question could not be employed so as to enable an equal division of the water to be made. The evidence shows that it has been constructed with weirs to gauge the water that passes into Mill creek, and that the water discharged into appellant's race passes through weirs provided for the like purpose.

I am unable to see how the suit can possibly be maintained upon the pleadings in the case. There has been a mass of testimony taken, tending to show the comparative amount of water the parties have been receiving since the dam complained of has been used, but it fails to prove that the structure is of such a character that an equal division of the water cannot be secured by means of it, and that is the vital issue the respondent must maintain to support his case by the record. Its complaint is against the construction of the dam, and the relief demanded is that the appellant be restrained from proceeding further with the erection of it, or from interfering with the respondent in the erection of a proper dam, with the view of dividing the water equally between the parties; but why the dam the respondent proposed to build will effect that end any better than the one in question, the complaint wholly fails to state. It is idle to allege that the dam the appellant was constructing would not divide the water equally, and that another one would, without pointing out the difference between them, or giving any reason why the one would be superior in excellence to the other; and yet that is the condition of the respondent's complaint in the case. A court of equity has undoubted authority to regulate the use of water, the right to which belongs to two or more persons in common, so as to preserve the right of each owner. Gould, Water, § 540; Ang. Watercourses, § 447a, and cases referred to in the notes. But this suit is not brought for that; the complaint was not framed in view of such remedy, nor does the relief demanded therein include it. A suit of that character would, under the circumstances, have been a very appropriate proceeding. The squabble between the officers of the two corporations, resulting in the pulling down and destroying of one dam, and the preventing by force the erection of another, was unworthy of the gentlemen who occupied those positions. The door of the courts

was open for the settling of the controversy; and they should have resorted to them in order to secure its adjustment. The respondent did begin a suit, but it entered the controversy in the forum where it had ended in the field. It was to complete by law what it had failed to effect by force: the preventing the appellant from building a dam, and the opportunity to build one itself. The circuit court strode over the case made by the pleadings, and attempted to adjudicate upon it the same as though it had been regularly and properly presented by the allegations of the parties. That course was a practical disposition of the affair; but I think the court should have directed the pleadings to have been amended, so as to have had the decree in accordance therewith.

It is a well-established principle of the law that a party must recover *secundum allegata et probata*; and, aside from that, the decree of the court settled nothing. It found as a fact that the appellant was receiving 25 per cent. more of the water than the respondent was, and, as a conclusion of law, that the respondent was entitled to receive 12½ per cent. more water than flowed to it through the three open weirs which discharged into Mill creek, and decreed that the respondent have authority to enlarge one of said weirs so as to discharge into said creek 12½ per cent. more water. Relief of that character could not properly be decreed in that way. The decree should have been made so as to have required the appellant to desist from turning the amount of water it was using into its race; compelled it to lessen the size of its weirs so as to draw off no more water than was discharging into the creek. The decree should have been made so as to operate personally upon the appellant; then, if it did not obey it, its officers could have been attached for contempt of the court. Authorizing the respondent to enlarge the weirs discharging into Mill creek would lead to endless controversy whenever it exercised the authority granted by the decree. The appellant would have been very likely to have claimed that the enlargement was greater than had been permitted, and in turn have commenced a suit to restrain the respondent from taking so large an amount of water. Besides, it would not have been prudent to leave such a matter to an interested party to adjust, and is not in accordance with the usual course of judicial proceedings. It is too much in the nature of a reprisal. The authorities maintaining the jurisdiction of a court of equity to adjust the rights of parties having a common interest in water for hydraulic purposes, are numerous, but I have been able to find but one which indicated with any degree of particularity the manner in which the adjustment should be made; that is the case of *Olmsted v. Loomis*, 9 N. Y. 423, which, in some respects, was similar to this, though the facts were more complicated. The court there held that the true and proper remedy was in the court of chancery, and that the mode by which the controversy could be determined with the least expense,

and the greatest certainty of doing justice, was by a reference to one or more suitable referees, one of whom should be a capable engineer or mill-wright. The court said that "such a referee can learn more of the true merits of the case in a day, upon an actual view and examination of the mills and premises, than a jury or court can ever learn from hearing or reading the testimony of witnesses."

This course of proceeding by a referee and view has another advantage over an action at law. It enables the court to exercise its power of preventing future litigation. Powers may be given the referee to prescribe and establish, under the direction of the court, some fixed mechanical gauge by which the quantity of water to which the plaintiffs are entitled may be kept within the main race, and not drawn off into the defendant's side race. This has frequently been done in cases of this description, and when parties cannot otherwise agree, and are disposed to be litigious, it is perhaps the only mode of preventing continual irritation and litigation between them. *Id.* 430, 431. If, in the present case, a course had been adopted similar to that suggested in *Olmsted v. Loomis*, it would have been much more satisfactory than a hearing upon depositions or oral testimony. The authority of the court to appoint a referee to ascertain any fact in a civil action, suit, or proceedings is ample. Civil Code, § 938, subd. 2. By that mode a decree could have been rendered that would have judiciously adjusted the matter in controversy between the parties, and been final, so long as the condition of their affairs remained unaffected by forces beyond their control.

The proofs, however, in the case disclose a case that embarrasses very much its settlement. It appears that two persons, Stratton and McCornack, are riparian owners of the land at the point where said dam is located, and for some considerable distance above and below it, and that they have, at a recent date, constructed a race connecting with Mill creek at a point immediately above said dam, and by means of which they conduct a quantity of the water thereof through their premises, and discharge it into the creek at a point below the dam; that they have constructed head-gates at the mouth of their race, and from time to time turn into it from the creek a supply of water sufficient to run a small mill owned by them. The water discharged from their race runs down to the respondent's mills, and unless the amount thereof is estimated in the division of the water of said creek between the appellant and respondent, as provided in the said covenant, the latter will obtain that amount more than one-half of it. It was claimed by the respondent upon the argument that the circumstance last referred to should not be considered, for the reason that Stratton and McCornack had no right as against either of the parties to divert the water of the creek, and that the covenant in the said deed of April 11, 1870, specified that the division of the water of the creek should be made at the dam. It may not appear from the proofs that Stratton and McCornack have any right to turn the water into

their race, but it would not be safe or prudent to adjudge that they had no such right in a case to which they were not parties. The adjudication would not, of course, bind them, and an attempted settlement of the rights of the parties to the suit, made upon the assumption that Stratton and McCornack were wrong-doers in their diversion of the water, would leave the matter in uncertainty and doubt.

In regard to the division of the water at the dam, the language of the covenant is as follows: "Said division of said Santiam water shall be made at or near the dam of the land claim of A. F. Waller and wife, where the race running to the oil-mill is taken out of said creek." Whether this language would necessarily require the division to be made below the mouth of Stratton and McCornack's race is not, as I view it, important. Each of the parties to the suit is entitled, as a matter of right, to one-half of the Santiam water, and of the water naturally flowing in the creek. The division is to secure to each of them that right, and if, by means of the race, a material part of the water is turned off above the point of division, but the respondent receives the benefit of it, the same as it would if not diverted, it must, as a matter of equity, be considered in the admeasurement of the water each is to have. The claim to such extra amount of water is unconscionable, and in violation of the maxim that "equality is equity;" and besides, there is nothing shown in the case that would estop Stratton and McCornack, if made parties to the suit, from proving that they had obtained a right, either from the respondent or from the Willamette Woolen Manufacturing Company, prior to the acquisition by the respondent of its interest in the premises, to divert and use the water in the manner they have done. It is impossible, in my opinion, to sustain the decree of the circuit court, or to grant the respondent any relief upon the pleadings as they are framed, consistently with equity and justice. The ordinary course, in such a case, would be to dismiss the complaint. But a large amount of testimony has been taken tending to show the amount of water the parties respectively are receiving. Many of the witnesses were professional experts in hydraulics, and a large expense has been incurred. The cause ought to be definitely settled, but it cannot be done unless it is sent back to the circuit court, the complaint ended, and Stratton and McCornack made parties. A referee could then be appointed to ascertain and report a proper mode for dividing the water. I have not examined the testimony with a view of determining which party has been receiving the most of the water that flows in Mill creek. I had an impression, when the case was argued, that the appellant was getting the larger portion of it, if the amount turned into Stratton and McCornack's race was not included, but all that evidence was in regard to water received by the parties after the commencement of the suit, and was irrelevant to the issue made by the pleadings. The threatened building of the dam was the "head and front of appellant's offending," and there was no cause for that. If the dam was so con-

structed that the weirs in the head-gate of appellant's race would discharge more water into the race than the same number and sized weirs in the dam would discharge into Mill creek, the difference could easily be remedied. The circuit court seemed to have no difficulty upon that point. But the several amounts of water the parties receive can never be adjusted with mathematical precision. A fair practical division of it is all that can be made. The more important determination is to establish the mode by which the division shall be made, in view of all the circumstances of the case.

A decree will be entered in accordance with the principles of this decision.

NOTE. Upon a motion for rehearing of this case it was ordered that the complaint be dismissed without prejudice.—[REP.]

(12 Or. 392)

SULLIVAN v. OREGON R. & N. Co.

Filed June 11, 1885.

1. EJECTMENT FROM RAILROAD TRAIN — EVIDENCE — PLAINTIFF'S STATEMENTS AFTER THE OCCURRENCE.

In an action for damages, statements made by plaintiff immediately after the occurrence, and in the absence of defendant, cannot be repeated by witnesses.

2. SAME—EVIDENCE—OWNERSHIP OF TRAIN.

In an action for damages for injuries sustained by plaintiff in being put off a railroad train, the plaintiff must prove, not that the train was that of defendant, but that it was in defendant's use at the time.

3. SAME—STOPPING OF TRAIN.

Before ejecting from a railroad train a passenger who declines to pay his fare, the conductor must first have the train stopped.

4. SAME—DAMAGES—EXEMPLARY AND PUNITIVE.

In order to entitle plaintiff to exemplary and punitive damages, it must appear, from the averments in the complaint, that the act complained of was done maliciously, or was the result of willful misconduct on the part of defendant, or of that reckless indifference to the rights of others as amounts to an intentional violation of them.

WALDO, C. J., dissenting.

Appeal from Wasco county.

Gates & Wilson and *J. E. Atwater*, for respondents.

Rufus Mallory and *F. P. Mays*, for appellants.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Wasco, rendered in favor of the respondent and against the appellant, in an action commenced in said court by the former against the latter to recover damages in consequence of his having been put off of a train of cars alleged by him to have been owned and operated by the appellant. The respondent alleged in his complaint in said action that on the tenth day of October, 1883, he went aboard of said train of cars at Dalles City, a regular station on the line of appellant's road, for the purpose of being conveyed to Portland, and that the conductor thereof, after the cars had started and were in motion, ejected him therefrom, by reason of which he was thrown under the wheels of the cars, and had his right foot so badly

crushed that it had to be amputated. The language of the allegation of the complaint referred to is as follows:

"That after the said train of cars had gone about one-fourth of a mile from said Dalles City, and while said train of cars was rapidly moving along its said railway, the defendant, by its agent and employe, who then had control, care, conduct of said train of cars for defendant, carelessly, negligently, and with force, ejected this plaintiff from its said train of cars, and caused him to fall from said cars to the ground while the same were so rapidly moving, and by reason of the said careless, negligent, and wrongful acts of the defendant, the plaintiff was thrown under the wheels of said cars, which cars then and there, on account of the wrongful acts of the defendant, as aforesaid, ran upon and over the plaintiff, and crushed and wholly destroyed his right foot."

The amount claimed, of general and special damages, was \$50,000. The appellant took issue respecting ownership and operation of said train of cars, the ejecting the respondent therefrom, and the damages alleged by respondent to have been sustained. It also set up in its answer that the injury received was in consequence of his own carelessness and negligence. The case was tried by the court, and a jury duly impaneled. It appears from the bill of exceptions that the controversy at the trial was mainly as to whether the conductor of the train pushed the respondent off the cars, or that he jumped off at his own instance. The respondent testified that the conductor pushed him off while the cars were in motion; the conductor, on the contrary, denied that he touched him; testified that he did not know when he got off the cars; that he went and pulled at the bell-rope, and when he looked around the respondent was off. Another witness called by appellant, who seems to have been a passenger aboard the train, testified that he saw the whole affair, and corroborated the testimony of the conductor; stated that the conductor did not touch respondent. He also testified that the respondent jumped off the train. The jury returned a verdict for the respondent and against the appellant for the sum of \$11,459, upon which the judgment appealed from was entered. The questions submitted upon the appeal involve the competency of some of the evidence given to the jury, and the correctness of a part of the instructions of the court to the jury, which we now proceed to notice. The bill of exceptions also shows that the respondent was a witness in his own behalf; that after he took the stand and was sworn he stated that he went aboard the train of cars at Dalles City on the tenth day of October, 1882; the train was bound west; that it was in front of the Umatilla House where he went onto the train; that he went aboard of it for the purpose of going to Portland; that the train was an Oregon Railway & Navigation Company's train, engine No. 80, marked "O. R. & N. Co.;" that it was a passenger train; that one Garfield was the conductor. He was asked by his counsel to state all that took place on board the train at and about the time he received the alleged injury. In answer to the questions he began by stating that he got on the train in front of the Umatilla

House and had a conversation with the baggage-master, which he began to relate, whereupon the appellant's counsel objected to it, but the court overruled the objection, and allowed the respondent's counsel to ask the witness this question: "State what you said to the baggage-master, and what he said to you." To which ruling the appellant's counsel excepted, and the witness stated in answer to the question that he got on the train just before it started; that he asked the baggage-master how Garfield was to ride with, to which the latter answered, "I guess he is all right; if he makes any 'kick' refer him to me."

This evidence was clearly inadmissible. The conversation between the witness and the baggage-master was wholly incompetent, but a majority of the members of the court are of the opinion that the evidence in nowise prejudiced the appellant; that it was really more calculated to prejudice the respondent's case than to benefit it. The witness then proceeded to narrate the circumstances of the injury. He testified that soon after the train started Garfield came out of the baggage car while he was standing on the platform at the forward end of the smoking car. A man named Clayton was with witness. There were two other men on the platform; the passengers went inside. While we were conversing Garfield came out of the baggage car, and I spoke to him for a ride to Portland, as a favor from a railroad man. He said, "I don't know you, and don't want to." Clayton handed him his pass while we were talking. Garfield said to me, "You will have to get off this train; you can't ride." Witness told him, "All right; stop his d—— train and he would get off." Witness then states that the conductor pulled the bell two or three times to stop the train, but it did not stop; that thereupon the conductor pushed him off the train, whereby he received the injury complained of. After the witness had been examined he called Charles Pool as a witness, who testified, among other things, that he saw the train pass west, and shortly after it had gone heard some one cry out, "Oh, say! Oh, say!" Went to where the person was and found the respondent. The respondent's counsel then asked the witness this question: "What did respondent say?" The appellant's counsel objected to the question, upon the grounds that the testimony was not competent. The court overruled the objection, and the witness answered: "I asked him what was the matter, and he said, 'The son of a bitch pushed me off or throwed me off; I am not sure which.' This was two or three minutes after the train passed. The train stopped just as it came through the cut-out on the flat."

The respondent then called two other witnesses to prove same facts, who were each asked some questions, which were objected to by appellant's counsel upon the same grounds, and the same ruling was made by the court, and exception taken. One of the witnesses answered that respondent said upon the occasion referred to, "Garfield pushed me off;" and the other, "that he had been pushed off the train,"

This testimony was calculated to influence the verdict of the jury, and, if incompetent, the judgment entered thereon should be reversed. Such testimony has in many instances been admitted in evidence, and courts have attempted to give reasons for holding it competent. The line of authorities in this country which maintain its admissibility seems to have commenced with the case of *Com. v. McPike*, 3 Cush. 184. The courts that have followed the ruling in that case have frequently manifested a sort of hesitancy as to its correctness, but have concluded that such statements were a part of the *res gestæ*, and been content to place their decisions upon that ground.

That mode of disposing of important questions of proof in such cases is becoming quite unsatisfactory. Its tendency has been to overthrow one of the fixed principles of the law, that the best evidence which the nature of the case is susceptible of shall be produced, and it leads to uncertainty and doubt. It is very easy to say that the statements and declarations of a party who has received an injury, made after its occurrence, as to how it was occasioned, are a part of the *res gestæ*, but extremely difficult to explain it, and many times wholly impossible to point out any rule under which the determination has been arrived at. An act may sometimes be explained, or its nature and quality be ascertained, by an accompanying declaration which may be properly regarded as a part of the transaction in which it occurred, but it is never the act itself, nor the mere evidence of it.

If a party were to be set upon and wounded, his narration of the circumstances attending the affair, or declarations as to who inflicted the injury, made after the transaction was ended and his assailant gone, would be no part of the occurrence; it could only be his own account of the affair. None of the class of cases referred to furnish any certain test as to when such declarations may be given in evidence as a part of the *res gestæ*. It is said in some of them that they must have been made at the time the act transpired; but in others, that a considerable time may elapse, and they still be such part; that each case must depend upon its own peculiar circumstances, and be determined by the exercise of a sound judicial discretion. I do not fully understand what is meant by the latter expression. If it is intended by "a sound judicial discretion" that the court before whom the trial is had must judge as to whether the transaction was continuing when the declaration was made, or had ended prior thereto, then the question would not differ from other questions regarding the admissibility of testimony; the court would consider the facts and circumstances surrounding the affair, and determine therefrom as to its competency; but if, on the other hand, it is to be understood that the court is to decide the question in accordance with the judge's notions as to justice of the particular case, then it is afloat without any chart to direct it. Precedents, under that view, would be of little value, as the peculiar circumstances attending each transaction would be likely to vary from those surrounding others of a like character

which had been adjudicated upon sufficiently to authorize a different holding. Such theory necessarily abrogates any law upon the subject; as law is, as a rule, applicable to a class of cases which are alike in principle.

The question is too important to be left to such uncertainty, and there is no occasion for leaving it to be determined by vague speculation. The authorities upon the subject are quite numerous, and are widely different. The Massachusetts cases, with the exception of the one referred to, have generally held to a reasonable and consistent rule upon that branch of evidence. They have repudiated the notion that the admission of such declarations is left to the discretion of the presiding judge, and admit them only when they are calculated to explain the character and quality of the act, and are so connected with it as to derive credit from the act itself, and to constitute one transaction. *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 41. This appears to me to be as liberal a rule as any court can, consistently with the rules of evidence, sanction, and I think it very doubtful whether our courts, under certain provisions of our statute, would have any right to permit the introduction of declarations of parties as evidence except under the condition of circumstances above referred to. Section 672, Civil Code, provides that a witness can be heard only upon oath or affirmation, and he can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible. And section 676, *Id.*, provides that where the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence as part of the transaction. These provisions of the statute are declaratory of the law upon the subject, and are binding upon the court; they limit the right of a party, in the introduction of that character of testimony, to those cases where the declaration forms part of the transaction which is in dispute, and provides that it is evidence as part of it.

This statute undoubtedly lays down the rule as broadly as many of the decisions of the court have done, especially some of the later ones. See *Waldele v. New York C. & H. R. R. Co.* 95 N. Y. 274, and *People v. Ah Lee*, 60 Cal. 85; but many others have gone a most surprising length beyond it. Among them is that in *Insurance Co. v. Mosley*, 8 Wall. 397. That decision and all of a kindred nature cannot, in my opinion, be maintained without doing violence to the law of evidence. It cannot be established by any system of logic that can be employed, that the statements and declarations of a party to a transaction, made after it has ended, are a part of it. It would be a moral impossibility. Take the case under consideration as an example. The respondent went onto the appellant's train of cars at the Dalles, and desired to be carried to Portland without paying fare. The appellant's conductor refused to carry him upon such terms.

After the train started, and had gone a short distance, the respondent is found off the train, upon the ground, in an injured condition, and he alleged as a cause of action against the appellant that the conductor pushed him off. The appellant, in its answer, denies that the conductor pushed him off, and avers that he jumped off. This is the principle issue in the case. The affair, whatever it was, occurred aboard the train of cars; everything that transpired between the conductor and the respondent took place there, and ended fully and completely when the respondent left the cars, whether he was pushed off or jumped off. When the respondent went from the cars onto the ground and the train had passed on, the transaction between him and the conductor was as effectually terminated as it was a month later. In a very few minutes after the train had passed the spot where the respondent struck the ground, three persons were attracted towards him, and naturally inquired how he came in that condition, and he answered, as an enraged person would be likely to under the circumstances, as before stated, and which implicated the conductor in a reckless and grievous wrong to him. Had the respondent complained of pain and suffering it would doubtless have been competent to have given that fact in evidence as proof of his injury; but to prove what he said the conductor did in order to attach the blame to the latter, and in his absence, is a distortion of the rule which permits the declaration of a party to be given in evidence. How can this statement be claimed to have been a part of the transaction between the respondent and the conductor when the affair was at an end, and the latter party probably a mile away at the time? I am unable to indorse any such view. The statement of the respondent at the time referred to, as to how he came off the cars, is as undoubtedly hearsay evidence as any narration of the affair he has given since that time. It occurs to me that courts at *nisi prius* would have but little difficulty in determining when the statements of a party in such cases were admissible as a part of the *res gestæ*, or were incompetent upon the grounds that they were only hearsay, if they would consider whether the transaction to which they related was continuing when they were made, or terminated at the time, and make that the test of the matter; and I believe that much of the embarrassment they labor under in applying the rule in such cases has arisen in consequence of an attempt that has frequently been made to stretch the *res gestæ* doctrine to an unnatural extent in order to suit some supposed meritorious case, and which has led to the great diversity of decisions and confusion of the law upon that subject.

The rule is very properly stated in *Williams v. Bowdon*, 31 Tenn. 282, in the following language: "The declarations are evidence because they are part of the thing *doing*; if, therefore, the thing shall have been *done* and *concluded*, declarations then made are not evidence." This is in consonance with the rule as declared in the provision of the Oregon statute before referred to; but the legislatures

of some of the other states have, as I view it, authorized its extension. It is declared by statute in the state of Georgia that "declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or after-thought, are admissible in evidence as part of *res gestæ*." Code Ga. 1873, § 3773. Under a provision of that character a declaration made after the transaction might be admissible; but the rule here is more restricted, and the declaration was improperly admitted. This disposes of the case, and it would be unnecessary to say anything more if it did not have to go back for a new trial; but, as it has to take that course, it becomes our duty to pass upon other questions assigned as error. The two instructions asked for by the appellant's counsel, viz.: "(1) The burden of proving that the train belonged to the defendant is on the plaintiff; this must be shown by proof, and if not proved the defendant is entitled to a verdict whether the plaintiff was put off the train or not. (2) If the train belonged to the Northern Pacific Railroad Company, the mere fact that the conductor was paid by the Oregon Railway & Navigation Company would not be sufficient to charge the defendant with the consequences of this injury;"—were properly denied by the court. The ownership of the train was not important; the material question was, which of the two companies was using it at the time. If it were being run by the appellant in its business at the time the affair happened, the liability would attach to that company, if any such liability were created. The conductor may have been the servant of the appellant and employed in its business, although the train—that is, the property interest in it—have belonged to the Northern Pacific Railroad; the train may have belonged to the latter company, but not been under its control at the time.

The second instruction asked for, which is above stated, may be true as an abstract proposition, but it had no sufficient relevancy to the case. The real question before the jury was, whose servant was the conductor when the affair took place? That he was paid wages by the appellant was some evidence that he was its servant at the time, and proof that the Northern Pacific Railroad Company owned the train, doubtless tended, in a measure, to show that it had the management and control of it when the occurrence happened; but the question was not of such a nature as to require the proof of it to be left to inference. The railroad was admitted to belong to the appellant; the conductor received his pay from appellant, and, presumably, the train was at the time being used in the appellant's business. In order to rebut this presumption the appellant should have proved by direct testimony that the other company was using the road-bed and running the train in its own business and for its own use. If the appellant's counsel had asked the court to instruct the jury that "if the train belonged to the Northern Pacific Railroad Company, and, at the time of the occurrence of the affair, was in the use and employment of that company, under a contract for the temporary use

of the appellant's road-bed, the mere fact that the conductor was paid by the appellant would not be sufficient to charge appellant with the consequences of the injury," he would have been entitled to have had it given, if there was any evidence before the jury tending to prove the fact; but in its present form it is too indefinite. Besides, the evidence did not justify the instruction. The payment of the conductor by the Oregon Railway & Navigation Company was not, under the evidence, "the mere fact" showing that it had no further connection with the train; there was the other fact before the jury, which was conceded, to-wit, that said last-named company was the owner and proprietor of the road itself at the time the event happened. The court, after charging the jury that it was conceded in the case that just previous to the accident the respondent was on board the train and attempting to ride to Portland thereon without paying fare, and that, under those circumstances, the agents of the company had a right to put him off if he refused to pay such fare, using reasonable care and caution in so doing, and that if, in putting him off under such circumstances, the respondent was injured, without negligence or blame upon the part of the appellant, then it was not liable for such injury; but it was its duty to first stop the train, and then put the respondent off; and if the appellant, through its agent, put the respondent off while the train was still in motion, and thereby caused the injury, the appellant would be liable therefor; and that, if the jury found that the injury to the respondent was caused by the negligence or willful misconduct of the appellant, committed through its agent, and that the respondent did not contribute to it by his own negligence, they should find for the respondent, and that the measure of damages would be (1) for the expense of procuring the necessary medical attendance, to an amount not exceeding \$150,—the sum alleged; (2) for the necessary expense of securing care and nursing, to an amount not exceeding \$309; (3) for bodily suffering, impaired working capacity, mutilation, and disfigurement necessarily resulting from the injury; (4) for such mental suffering, apprehension, and anxiety as necessarily result from the injury,—proceeded to instruct them, as a fifth item of damages, that if they should find from the evidence that the injury was malicious and willful, or was caused by gross and wanton negligence, amounting to a total disregard of all social obligations, they would allow such sum as they would deem just and proper by way of punishment, and to deter others from such malicious, and grossly and wantonly negligent, acts in the future.

This last instruction was excepted to by the appellant's counsel, and it becomes our duty, as before indicated, to consider its correctness. It has in many instances been seriously questioned whether exemplary or punitive damages could properly be allowed in any private action. It would be extremely difficult, if not impossible, to give any good reason for such allowance, since the rule giving actual damages has been so liberally construed; but, however that may be, it

seems to have attached itself to our jurisprudence, and we are made recipients of its benefits and compelled to endure the hardships it imposes. However, I am opposed to extending the rule to cases to which it was never intended to apply, and would work injustice if the application were enforced. When the conduct of a person has been willful, malicious, and wanton, or reckless, and an injury has resulted to another in consequence of it, a jury might, with a semblance of reason, in an action to recover damages for such injury, assess something more than a mere compensatory sum therefor. That course, doubtless, would have a salutary effect in two respects: would visit the wrong-doer with wholesome punishment, and afford an example calculated to deter others from the commission of malevolent acts; but to attempt to extend the doctrine so as to visit the punishment upon innocent parties, is, to my mind, unreasonable and unjust. I cannot see any principle upon which an employer, whether a natural or artificial person, can be made liable for the acts of his or its servant, beyond compensatory damages, unless the employer directed the doing of the act, or ratified it after it was done. In the case at bar the railroad company had been guilty of no wanton or reckless act in the premises, whatever its conductor may have done; then why should it be punished? It is made liable for damages by the acts of its conductor, by reason of the duty it owes to the public. It has impliedly stipulated to observe certain duties and obligations,—among them that it will transport passengers upon its train of cars safely and with reasonable dispatch, and that it will insure them proper treatment while in transit; and its duty and obligation may be violated through the acts of its employees. The act of the conductor, whether it be negligent, malicious, or reckless, will effect such violation the same in the one case as in the other. Should the conductor wantonly and cruelly mistreat a passenger, the company is made liable, not strictly for the act of the conductor, but for the reason that the company has failed to perform the duty it undertook, and the obligation it tacitly agreed to observe.

The acts of the conductor in the present case may have been so malicious and reckless as to indicate a depraved mind, and if such were the fact he ought to be punished for his wickedness; but by what rule of consistency can that punishment be inflicted upon the company? It did not obligate itself that it would not engage the services of any one who would never display malice or exhibit recklessness, and it should not be made answerable for the sins of the conductor, except so far as they effected a breach of its contract before referred to. It is claimed, however, in the decisions of the courts, which hold that a railroad company is liable to exemplary or punitive damages, that the conductor of a train of cars is *pro hac vice* to be regarded the company itself; but this certainly is only a fiction of law. The fact that the company acts through agents in the transaction of its business, is no more peculiar than where a natural person

transacts his business through agents. The conductor usually has no pecuniary interest in the company beyond the stipend he receives for his services; he is not punished by the judgment against the company, whatever may be the amount of it. Corporations acquire their vitality by subscription for its capital stock. In this state one-half thereof must be subscribed before it is allowed to engage in the business proposed in its articles, then the stockholders have a meeting, and choose directors, who thereafter manage its affairs. The pecuniary interest, the real substance of the corporation, is represented by its stock; its entire assets belong to the owner of the stock. They may be persons in moderate circumstances, who have invested their surplus earnings in the purchase of the stock, relying upon dividends to be realized therefrom. It is the stockholders who are affected injuriously by a judgment against the corporation, and who are punished when exemplary damages are awarded in the action, and, if there is any justice in a rule which allows it in such a case, I am apprehensive that I shall never be able to discover it. Different views are entertained upon the question by courts in the different states, and, while those of quite a number of them have held that such damages were allowable against a corporation for the acts of its agents, yet those of a very respectable number of the other of the states have maintained to the contrary. I think the rule upon the subject laid down in *Cleghorn v. New York Cent. & H. R. R. Co.* 56 N. Y. 44, the correct one, which makes the master liable for such damages when he is chargeable with gross neglect in the employment or retention in his services of an incompetent servant, knowing at the time of his unsuitability, or that he authorized or ratified the act of the servant in the particular case. The question as to whether the complaint is sufficient to permit the recovery of that character of damages in the case need not, under the view taken of the last point, be decided. It will not be amiss, however, to suggest that, in order to recover exemplary damages in any case, it must appear from the complaint, either by direct averment or from necessary inference, that the act occasioning the damages was done maliciously, or was the result of the willful misconduct of the defendant, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

The judgment appealed from is reversed, and the case remanded to the court below for a new trial.

LORD J., concurs, except as to the last point discussed.

WALDO, C. J., dissented.

(12 Or. 407)

PARKER v. METZGER and others.

Filed June 25, 1885.

REAL ESTATE—ADVERSE POSSESSION—TITLE.

An adverse, unbroken, exclusive, open, and notorious possession of land for 20 years gives to the person so possessing it a complete title.

Appeal from Multnomah county.

C. F. Paxton, for appellant.

W. T. Burney, for respondent.

LORD, J. The substance of the facts as found by the referee, and out of which the main contention arises, are: That on or prior to the fifteenth day of November, 1865, the plaintiff owned and was in possession of, as a part of her portion of the donation land claim of Davis Duvall and wife, the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 15, township 1 S., range 3 E., in Multnomah county, Oregon; that upon said date the plaintiff, then Priscilla Duvall, joined with her husband, Davis Duvall, in a conveyance of land in which said 40-acre tract, the land in dispute, together with other property, was deeded to one Tomlinson; that the said 40-acre tract was included in said conveyance by mistake of both parties, the intention of all parties being to convey only the land of Davis Duvall, and that the plaintiff joined in said deed solely for the purpose of barring her dower, the intention being to further vest in said Tomlinson the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of said N. E. $\frac{1}{4}$ section, which he had purchased, and by similar mistake the said 20-acre tract was not so conveyed; that no consideration was paid plaintiff or her said husband for said 40-acre tract deeded to Tomlinson, and that said 20-acre tract was occupied by Tomlinson thereafter, and has not been in the occupation of plaintiff since said conveyance, and the said mistake was not discovered by plaintiff, or any one, until about the year 1874; that in July, 1874, the said Tomlinson died, leaving minor children surviving him, none of whom are of age; that on the ninth day of May, 1882, a guardian's deed was made to the defendant Metzger of said premises, under a sale previously made by the guardian of said minors, under an order of the county court, and the said guardian's deed was placed upon record before the commencement of this suit; that the said defendant Metzger had actual notice of the claim of plaintiff to said land before purchasing at said guardian's sale, and that the plaintiff is the owner as to said defendants of said real estate, and that the defendants have no right, title, or interest therein or thereto; that from and after said conveyance to said Tomlinson the plaintiff and her husband continued to cultivate said portion of said 40-acre tract lying within her inclosure, and the plaintiff has continued in the occupation and cultivation thereof up to the present time, and has cut timber and sold timber from said 40-acre tract within four or five years after said conveyance was made; that all of said acts of ownership of said land by the plaintiff were done under the claim of ownership of all of said land ad-

versely to all persons, and the said acts and the claim of ownership were open and notorious, and were well known to said Tomlinson during his life-time.

These facts as found, we think, are substantially sustained by the evidence. The suit is based upon two grounds, either of which, it is contended, entitles the plaintiff to the relief prayed for. Upon the first ground the plaintiff claims the legal title to the 40-acre tract of land in dispute by reason of adverse possession under a claim of title, and insists that being in possession of the premises, and invested with the title by operation of the statute of limitations, and the defendants claiming some interest therein adverse to her, she is entitled to the relief sought. On the other hand, it is contended that the statute of limitations does not vest the title in the person who holds the lands under it; that it affects the remedy only, and not the right; and that plaintiff, not having the legal title, has no standing ground upon which she can maintain this suit. In support of this position we are referred to *Goodwin v. Morris*, 9 Or. 322, and *Myer v. Beal*, 5 Or. 130. But neither of these cases were actions or suits concerning title to real property; and as to actions of tort or upon contract, as decided in those cases, the law seems to be that the statute bars the remedy only. But the question here directly is, whether our statute bars the right, and vests the title in the party who brings himself within its provisions. If it does, then it is conceded that the suit may be maintained. This question has been very ably and thoroughly examined and answered by Mr. Justice SAWYER in *Arrington v. Liscom*, 34 Cal. 380. In that case the suit was, as here, to quiet title; and, after an elaborate review of the authorities, the result reached was that adverse possession for the full period limited by the statute confers title, and that it is such title as entitles the holder to all the remedies to quiet his possession that are incident to possession under written titles. In the course of his opinion he said: "Some recent statutes provide in express terms that adverse possession for the time prescribed shall extinguish adverse titles and vest the possessor with the fee." Ours contains no such express provision; but is not that the effect of our statute when properly construed? Angell says, in the language of Mr. Chancellor HARPER, in *Drayton v. Marshall*, 1 Rice, Eq. 385: "The belief is that no case can be put, in which a private individual knows that another person claims and is in the actual enjoyment of land which belongs to him, and neglects to prosecute his rights at law, when there is nothing to prevent his doing so, that he will not be barred by the statute of limitations." Ang Lim. 397, § 2. And Angell further says: "It is also unquestionable that where the land has been held, under a claim to the fee, for the time prescribed by the statute, and an entry is made by the party who has the written title, such party may be dispossessed by an ejectment brought by him who has so held and claimed." Id. 398, § 2. This was so held in *Jackson v. Oltz*, 8

Wend. 440. The lessor of the plaintiff had been in possession for the period prescribed by the statute, claiming title under a patent. Defendants afterwards entered and held under a title which had been judicially determined to be valid. The action was brought by the plaintiffs, relying on the title acquired by adverse possession, against the defendants holding such paper title, and a recovery had. The court say: "If the possession was adverse, and had been so for more than twenty years, as it had in this case, then the possession ripened into a title, and the plaintiff must recover against the defendant, though the paper title to the fifty acres is, in reality, not in him."

The same principle is recognized in *Jackson v. Dieffendorf*, 3 Johns. 269. And in *Jackson v. Rightmyre*, 16 Johns. 327, Mr. Chancellor KENT says that showing a possession of 38 years under a claim of right "was showing an absolute right of possession sufficient to toll an entry."

Our statute of limitations relating to real estate is copied from the statute of New York, with but slight verbal changes, and we are not aware of any provision in the statute of New York which would affect the construction on this point. In *Bradstreet v. Huntington*, Mr. Justice JOHNSON says "that an adverse possession, when it actually exists, may be set up against any title whatsoever, either to make out a title under the act of limitations, or to show the nullity of a conveyance executed by one out of possession. On the first two of the propositions there can be no doubt, and none has been expressed." 5 Pet. 438. And in *Drayton v. Marshall*, Mr. Chancellor HARPER says: "The time then required to mature a title by the statute of limitations had run out more than five times before the filing of this bill." 1 Rice, Eq. 384. And again: "But if, by the statute, the defendants have acquired a title to the fee, they can of course have no right of redemption against themselves. This must be merged or extinguished in the fee." Id. 386. These remarks all go upon the idea that adverse possession for the time prescribed confers upon the possessor some interest, some positive right; that it affords him something more than a shield; in short, invests him with title. In *Le Roy v. Rogers*, 30 Cal. 34, we said: "Rogers' title, thus acquired by adverse possession, the claimants under the patent having a right of action and being under no disability, could not be impaired by an entry by them, claiming under the patent, unless made in pursuance of a judgment to which Rogers was a party or privy." So, in *Taylor v. Horde*, 1 Burr. 119, Lord MANSFIELD said: "Twenty years' adverse possession is a positive title to the defendant. It is not a bar to the action or remedy only, but it takes away the right of possession." To the same effect are *Stokes v. Berry*, 2 Salk. 421, and *Pederick v. Searle*, 5 Serg. & R. 239.

In *Leffingwell v. Warren*, 2 Black, 605, the supreme court of the United States says: "The lapse of time limited by such statutes not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder." So, in *School-district v. Benson*, 31 Me. 384,

the court say: "A legal title is equally valid, when once acquired, whether it be by disseizin or by deed; it vests the fee-simple, although the mode of proof, when adduced to establish it, may differ. * * *

When the title is in controversy, it is to be shown by legal proof, and a continuous disseizin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by an exhibition of them in evidence. An open, notorious, exclusive, and adverse possession for twenty years would operate to convey a complete title to the plaintiffs; as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character,—the absolute dominion over it,—and the appropriate mode of conveying it is by deed." See, also, *Barwick v. Thompson*, 7 Term R. 492; *Beckford v. Wade*, 17 Ves. Jr. 87; *Moore v. Luce*, 29 Pa. St. 260; *Lessee of Thompson's Heirs v. Green*, 4 Ohio St. 223; *Newcombe v. Leavitt*, 22 Ala. 631; *Chiles v. Jones*, 7 Dana, 528. And again: "Whatever may be true of personal contracts, it certainly cannot be said with reference to realty, in view of the authorities cited, that the statute only takes away the remedy, or that a right, a title, is not practically extinguished as to one party and acquired by another. The five years' adverse possession, practically, at least, is conclusive evidence of title in the possessor, and if conclusive evidence of title in him, it must be as conclusive evidence of no title in the other. What is the legal definition of title to land? A title is thus defined by Sir Edward Coke: '*Titulus est justa causa possidendi id quod nostrum est*; or it is the means whereby the owner of land has just possession of his property.'" 2 Bl. Comm. 195. If this definition presents the true idea of title, then, when a party's means of obtaining possession, or maintaining possession when obtained, have been extinguished by an adverse possession, it would seem to follow that his title is effectually and substantially extinguished in fact, whatever his condition theoretically may be. And the party who has acquired an absolute right of possession, which will not only shield him in his possession against the attacks of all the world, but, when ousted, will restore him to and protect him in his just possession, even against the party having the written title, would seem to have a substantial title.

We can see no reason why, for all practical purposes, such a party's title should not be regarded, both in law and equity, as good as though he also had a perfect written title; and we are dealing with practical and not merely theoretical questions. If a party's right of possession has become absolute, has by long adverse possession ripened into what may as well and as properly, for practical purposes, be called title as anything else, so that he can maintain his possession, or recover it when ousted, or maintain all actions for injuries to it against the party having the written title, in all respects, in the same manner, and to the same extent as against parties who never were other than entire strangers to the premises; if the party having the writ-

ten title has lost, by the adverse possession, all means of recovering or protecting possession when acquired without action, and all means of establishing or maintaining any right against the adverse possessor,—we can perceive no good reason why such adverse possession should be annoyed by pretended claims, or have the value of his possession diminished by an apparent title which has lost its vitality. We see no good reason why the party whose adverse possession has practically ripened into a title, should not be entitled to all the remedies to quiet his possession that are incident to possessions under written titles, which are in law and equity no more efficacious to protect the owners in the actual enjoyment of their possessions under them. Statutes of limitation are said to be statutes of repose. If so, they should be so construed and administered with respect to cases falling within their purview as to afford complete, not merely partial, repose.

To the same effect is the case of *Alexander v. Pendleton*, 8 Cranch, 462. The action was by the party in adverse possession against the other claimants out of possession, and a decree establishing title, and granting affirmative relief quieting it, was rendered, based upon a title acquired by adverse possession. Mr. Chief Justice MARSHALL said: "The appellant's title being secured by possession of more than fifty years, is unquestionably good, and it is proper that the doubts that hang over it should be removed." The statute under which this was done only purported, by its terms, to bar the remedy; it did not provide that the title of the owner should be extinguished, or that the possessor should be invested with a title. In *Sherman v. Kane*, 86 N. Y. 64, it is held, where title to land has been acquired by 20 years' adverse possession, it is equally as strong as one obtained by grant, and is not forfeited by an intermission of the actual occupation thereafter. The court say: "If the title had been acquired by grant, such an act could not affect or invalidate it; and as title by adverse possession is equally strong as one obtained by grant, no reason exists for making an exception against the letter. A perfect answer, also, to the position of the learned counsel is that the city had title by adverse possession, and that title continued after it had become perfect and complete, without regard to the interruption of the actual occupation or possession." It thus appears that adverse possession for the time prescribed vests a perfect title in the possessor as against the former holder of the title and all the world, and that he is entitled to all the remedies at law or in equity which are incident to possession under written titles. See, also, *Jones v. Brandon*, 59 Miss. 585; *Hinchman v. Whetstone*, 23 Ill. 189; 3 Wait, Act. & Def. 19; *Cannon v. Stockmon*, 36 Cal. 541. It is hardly necessary to review in detail the testimony. It shows satisfactorily to us that the possession of the plaintiff has been adverse, exclusive, unbroken, open, and notorious. She has always claimed to be the owner, and as such she has paid the taxes on this land, erected a building on it, set out fruit trees on it, grubbed and cleared part of it, seeded it with timothy and clover, cut

hay off it, made and changed fences on it, used fire-wood from it, sold shingles and rail-timber off of it, some seasons cultivated it, and in all these various ways actually possessed and exercised acts of ownership over it.

Upon the second point, upon which it is claimed the plaintiff is equally entitled to the relief asked, the conclusion above reached renders it unnecessary to pass further than to remark that the case cited in *School-district v. Wrabeck*, 31 Minn. 77; S. C. 16 N. W. Rep. 493, seems to sustain the view urged by counsel for plaintiff.

The decree of the court below must be affirmed.

(12 Or. 352)

STATE v. HALE.

Filed June 11, 1885.

CRIMINAL LAW AND PROCESS—THEFT—STOLEN PROPERTY—EVIDENCE—POSSESSION—PRESUMPTION.

The possession, shortly after the theft, of the property stolen is a fact to be submitted to the jury, but it does not raise, as to the party so possessing, the presumption of guilt.

Appeal from Umatilla county.

Wm. M. Ramsey, for appellant.

Morton D. Clifford, Dist. Atty., and W. H. Holmes, for respondent.

Lord, J. The defendant was indicted for the larceny of certain cattle, tried and convicted, and from the judgment of conviction brings this appeal to this court. There are numerous assignments of error, but, after an attentive examination of them, we are satisfied there is but one that is material and error. The court instructed the jury that "when property recently stolen is found in the possession of any person, such possession raises a presumption of guilt, and unless he shows that he came honestly into the possession of said property the law will presume that he stole the same." The objection to this instruction is that the weight to be given to fact or circumstance is, under our statute, to be left to the jury; that the court is not authorized to pass upon the weight to be given to any circumstance, or to direct the jury in reference thereto. It is often said that the recent possession of stolen property by the prisoner, unexplained, raises the presumption that he is the thief, and that this presumption shifts the burden from the state to the prisoner. But the presumption raised by such circumstances is one of fact, from which the jury may infer guilt. There is no legal presumption of guilt from the recent possession of stolen property.

In *Conkwright v. People*, 35 Ill. 204, it was held error to instruct a jury, upon a trial for larceny, that possession of stolen property soon after it is stolen is of itself *prima facie* evidence of theft by the possessor, and the burden of proving his possession to have been honest is there thrown upon him. The question is undoubtedly a vexatious one, and upon it, as Mr. Bishop says, "all sorts of utterances are to be found in the books." Bish. Crim. Proc. § 740. But we regard it

as a question of fact and not of law, to be submitted to the jury, and for them to determine whether the defendant is the guilty party or not. In *Curtis v. State*, 6 Coldw. 9, the court say: "The possession of such a chattel as a horse, two months after the theft, is a circumstance to be considered by the jury; but it does not, even unexplained, raise a conclusive presumption of the prisoner's guilt. The jury may, and should, give it proper thought as evidence; but the matter is for them, and they are not bound in such case to convict the prisoner unless they are, upon the whole evidence, satisfied of his guilt." In *State v. Hodge*, 50 N. H. 510, this whole subject, and the authorities upon it, is ably and thoroughly reviewed, and the result there reached is in conformity with our views.

We think the instruction was error. The judgment must be reversed, and a new trial ordered.

(12 Or. 391)

CITY OF CORVALLIS v. STOCK.

Filed June 11, 1885.

PRACTICE—RIGHT OF APPEAL FROM RECORDER'S COURT.

By the decision in the case of *Sellers v. City of Corvallis*, 5 Or. 273, it is established that a party has a right of appeal from the recorder's court.

Appeal from Benton county.

J. W. Rayburn, for appellant.

John Burnett and J. R. Bryson, for respondent.

THAYER, J. This appeal involves the question of the right of appeal from the recorder's court. It was held by the court in the case of *Town of Lafayette v. Clark*, 9 Or. 225, that an appeal would not lie from the recorder of a city, in adjudications upon city ordinances, unless given by statute. The question here is whether the charter of the city of Corvallis gives such right of appeal. Upon an examination of said charter we have discovered that there is, in our opinion, no material difference between its phraseology and that employed in the Lafayette charter upon that subject. And we should be inclined to hold that it did not provide for such appeal were it not for the decision of this court in *Sellers v. City of Corvallis*, 5 Or. 273. That decision was rendered by judges occupying the same position as we do, and while we do not indorse it, nor regard the reasons upon which it was predicated as satisfactory, yet we do not feel at liberty to depart from it in this particular case. If it were a case of continued injustice, or of a clear violation of obvious principles of law, we ought not to hesitate a moment in pronouncing it not law; but under the circumstances we think we should be controlled by the doctrine of *stare decisis*. Whichever way we might determine the matter would be of no public importance, and as we find that the identical question has been adjudicated upon and acquiesced in for a number of years, has concluded that we should not attempt to disturb it.

For these reasons we are of the opinion that the judgment appealed from should be affirmed.

SUPREME COURT OF UTAH.

(4 Utah, 112)

PEOPLE v. FENNEL, impleaded, etc.

Filed June 18, 1885.

1. PRACTICE—SUPREME COURT—NOTICE OF APPEAL—FILING—SERVICE UPON OPPOSING ATTORNEY.

In order that a case may be properly before the supreme court, it must appear by the record that the notice of appeal was filed with the clerk of the court below, and that a copy of such notice was served upon the attorney of the adverse party.

2. SAME—APPEAL—RECORD.

The supreme court can only learn from the record whether an appeal has been properly taken or not.

POWERS, J., dissenting.

Motion to dismiss an appeal.

Arthur Brown, for appellant.

W. H. Dickson, for respondent.

BOREMAN, J. The appellant was convicted of murder in the Second district court, and sentenced to imprisonment in the penitentiary for a term of years. From that judgment he brings the case to this court. The prosecution filed two motions to dismiss the appeal, the first of which alone will it be necessary for us to consider. The ground of the first motion is that no appeal was taken as required by law, as it does not appear from the transcript that any notice of appeal was ever served upon the attorney for the people. The criminal practice act (Laws Utah 1878, p. 137) provides as follows:

"Sec. 363. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party."

Two things are required by this section to be done, before an appeal is perfected, namely: (1) The filing of the notice of appeal with the clerk of the court below; and (2) the serving a copy of such notice upon the attorney of the adverse party.

The transcript shows that notice of the appeal was filed with the clerk of the court below, but fails to show any service of the notice upon the attorney for the people. The record should show this. It is now offered to supply in this court the proof of this service. We cannot receive such proof. This court can only learn from the record whether an appeal has been taken or not. Nothing outside the record can be shown in this court to supply the defect. This same question was before this court on a former occasion, in the case of *People v. Gough*, 2 Utah, 69, and it was then held that the failure of the transcript to show the service of the notice of appeal upon the attorney of the people was fatal, and that the proof of such service could not be supplied in this court. We see no reason to change that ruling.

The motion to dismiss the appeal is sustained.

ZANE, C. J., concurred.

POWERS, J., *dissenting*. In this case the transcript shows that notice of appeal was filed with the clerk of the lower court within the time allowed by law, but it does not show that a copy was served upon the district attorney or his assistant. Therefore, a motion to dismiss the appeal is made by the district attorney under the provisions of the criminal practice act, (Laws Utah 1878, p. 137,) which provides that "an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same, and serving a copy thereof upon the attorney for the adverse party." The criminal practice act, § 370, also provides that "if the appeal is irregular in any substantial particular, but not otherwise, the appellate court may, on any day in the term, on motion of the respondent, upon five days' notice, accompanied with copies of the papers upon which the motion is founded, order it to be dismissed."

On the hearing of this motion it was admitted that service of a copy of the notice of appeal upon the proper person had actually been made in due time, but that there had been a failure to file proof of service. Under such a state of facts it is a hardship to dismiss the appeal upon a bare technicality, particularly when the appellant is convicted of murder, and sentenced to a long term of years. The law gives him a right to have his case reviewed by this court, and we should be careful how we defeat that right by a too rigid application of the rules of practice. The notice of appeal that must be filed with the clerk is the claim of appeal. The copy which is required to be served is merely for the purpose of notifying the opposite party. In this case the copy was in fact served, so that no one has been misled. The district attorney has heretofore been in court and agreed that this case be set for a day certain, so it is plainly seen that the people have not been injured by this error.

Courts of last resort are loath to dismiss appeals on account of mere errors of practice. *Maynard v. Hoskins*, 8 Mich. 81; *Corell v. Mosely*, 15 Mich. 514; *Babcock v. Twist*, 16 Mich. 282. It is entirely discretionary with this court whether the appeal be dismissed or not, and the court should so exercise its discretion as to prevent injurious effects in cases of accident, or even neglect, when such neglect is fully explained and excused, and such accident fully accounted for. *Lathrop v. Hicks*, 2 Doug. (Mich.) 222. Thus, when the statute made the copy of an appeal-bond a necessary part of the record, and a motion to dismiss was made on the ground that the record as sent up did not contain such copy, the court refused the motion, and ordered a further return to be made for the purpose of bringing it up. *Maynard v. Hoskins*, 8 Mich. 81; *Garratt v. Litchfield*, 10 Mich. 451. True, in the case of *People v. Gough*, 2 Utah, 69, on a state of facts similar to the case at bar, the court dismissed the appeal. But I do not think any iron-clad

rule should be adopted. Each case should stand upon its own peculiar facts, and the court should exercise a wise discretion. In the present case the requirements of justice demanded that the record be remanded to the lower court for correction. This court has power so to do, and it should exercise it, instead of dismissing the appeal on a barren technicality.

(4 Utah, 416)

UNITED STATES v. AVERILL and others.

Filed June 18, 1885.

1. DISTRICT COURT—CLERK'S FEES.

The fees to be retained by clerks of district courts of the territory of Utah, as compensation for their services, are not limited to the maximum sum of \$3,500.

2. SAME—CONSTRUCTION OF STATUTES.

Statutes passed by congress in reference to the subject, construed.

Appeal from the district court.

Dickson & Varian, for appellant.

Sheeks & Rawlins, for respondents.

BOREMAN, J. This is an action brought by the United States against Oscar J. Averill, and his sureties on his official bond, as clerk of the Third district court of this territory, to recover certain balances of the fees and emoluments of his office in excess of the yearly limit of \$3,500, claimed to be fixed by United States statutes. To the complaint a demurrer was filed to each count, alleging that the same did not state facts sufficient to constitute a cause of action. The demurrer was sustained. The objection under this demurrer, that the statements relative to the execution and delivery of the bond were not made in the various counts subsequent to the first, was raised and abandoned by defendants Keyser and Prescott, who alone were served with process and appeared. The demurrer being sustained on other grounds, and appellant electing to stand upon the complaint and declining to amend the same, final judgment was entered in favor of respondents, and thereupon appellant brought the case to this court. The sole question in dispute is as to whether the clerk was required to account for and pay over to the United States the fees and emoluments of his office in excess of \$3,500.

The district courts of this territory are territorial and not United States courts, but have United States circuit and district court jurisdiction, and chancery and common-law jurisdiction. They are dual in their nature, exercising, on the one hand, the powers of a United States court in the states, and on the other hand the powers common to a state court. They appoint their own clerks, there being but one clerk in each district, and such clerk attending to both United States and territorial matters. The United States marshal for the territory, and the United States district attorney for the territory, are appointees of the president by and with the advice and consent of the senate. Whether there be any statute of the United States limiting the com-

pensation of a United States marshal for the territory to a maximum of \$6,000 or to any other sum, or whether there be any such statute limiting the compensation of the United States district attorney for the territory to a maximum of \$9,500, or \$6,000, or \$3,500, are not questions now before us for consideration, and the fact that the treasury department may construe the law limiting the compensation allowed to such officers in the states as applicable to these officers in a territory, although persuasive and entitled to a respectful consideration, is not conclusive upon this court.

From the foundation of the government up to the year 1853, there was no statute or law placing a limit upon the amount of the fees and emoluments of officers that might be retained by or allowed to the United States marshals, United States district attorneys, and United States circuit and district court clerks, inside of the states. But in that year, 1853, congress prescribed a limit to the amounts that these officers in the states might retain or be allowed, of the fees and emoluments of their respective offices. No limit was placed upon the compensation to be allowed the clerk of the United States supreme court for many years thereafter, namely, in 1883. 22 St. at Large, 631. The act of congress of 1853 limited the compensation of United States marshals and United States district attorneys in the states to \$6,000 each per annum, and of the clerks of the United States circuit and district court in the states to \$3,500 each per annum; but this act was not made applicable nor interpreted to apply to any United States marshal or United States district attorney in any territory, nor to the clerk of any supreme or district court in any territory; nor did the treasury department hold that it was applicable to any such officer in any territory. The law stood thus until the twenty-third day of June, 1874, when congress enacted that "the fees and costs to be allowed to the United States attorneys and marshals, to the clerks of the supreme and district courts, and to jurors, witnesses, commissioners, and printers, in the territories of the United States, shall be the same for similar services by such persons as prescribed by chapter 16, title, 'The Judiciary,' and no other compensation shall be taxed or allowed." U. S. Rev. St. 1878, (2d Ed.) § 1883. This section does not purport to extend the whole of "chapter 16" over the territories. It points the officers to the chapter where the various items of service they can charge for, and the amounts they can charge, can be found, but does not refer to such chapter to find the limitation upon the amount they may retain or be allowed after the charges, fees, and costs have been collected. It says that "the fees and costs to be allowed such officers," etc., "shall be the same for similar services by such persons as prescribed by chapter 16," etc.; and then it prohibits them from claiming any other compensation, saying that "no other compensation shall be taxed or allowed." From this language it might be a question whether the statute was intended to control even the fees of such per-

sons and officers in other than United States cases. It evidently did not look to the fixing of a limit to their incomes. The United States Revised Statutes embracing this provision were approved on the twenty-second day of June, 1874, and on the following day congress passed, and the president approved, another act, entitled "An act in relation to courts and judicial officers in the territory of Utah," commonly known as the "Poland Bill." By the seventh section of this latter act it is provided:

"Sec. 7. That the act of the territorial legislature of the territory of Utah, entitled 'An act in relation to marshals and attorneys,' approved March 3, 1852, and all laws of said territory inconsistent with the provisions of this act, are hereby disapproved. The act of the congress of the United States, entitled 'An act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States, and for other purposes,' approved February 26, 1853, is extended over and shall apply to the fees of like officers in said territory of Utah. But the district attorney shall not, by fees and salary together, receive more than three thousand five hundred dollars per year; and all fees and moneys received by him above said amount shall be paid into the treasury of the United States."

These two statutes having become laws within a day of each other, and being upon the same general subject, should be construed together. The latter says that "the act of congress entitled," etc., "is extended over and shall apply to fees of like officers in said territory of Utah." This portion of the latter section does, in specific terms, what the former enactment did in general terms; and the repetition of this act in regard to Utah, of the general provision, seems mainly to have been necessary in order to give full effect to the antecedent provisions, in the same section, disapproving an act of the territorial legislature, and disapproving "all laws of said territory inconsistent with the provisions of this act," and the subsequent limitation on the income of the district attorney; it being the evident aim and purpose of congress, by this enactment, to blot out all provisions of territorial statutes inconsistent with the United States fee-bill, and to give a new fee-bill, and to place a further restriction upon the amount in fees and salary to be allowed the district attorney by the government. To say the least, there is nothing in the fact that in a part of a section in a special law there is in substance repeated what is enacted in a general law on the same or preceding day, that would lead us to believe that more was intended in the special than in the general law, when we can see good reason for the repetition, and no express language is used to convey the idea that more was intended. It will be noticed that the act thus, by said seventh section, extended over the territory, was an act "to regulate the fees and costs;" and it was also an act "for other purposes;" but, so far as express language goes, it extends the act over the territory only to regulate the fees. There is nothing said about the "other purposes." To interpret or construe it as including the "other purposes," would seem to be putting an improper strain upon the language used. Where statutes are

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restrictive of the rights of public officers to all the fees and emoluments of their offices generally allowed by law, limiting and cutting down their compensation to a fixed maximum, they are to be interpreted so as to give effect to the restriction only so far as the legislature has positively spoken. *U. S. v. Bassett*, 2 Story, 389. This statute certainly has not, in express words, said that the limitation provisions of the act of congress of 1853 are extended over the territory and made to apply to these officers. We have no right to place a forced construction upon the language used. It is an equitable and just rule that where there is doubt in regard to the construction of a statute regarding the compensation of officers, the construction most favorable to the officer should be adopted. *U. S. v. Morse*, 3 Story, 87; *Moore's Case*, 4 Ct. Cl. 139. Recognizing this rule, and upon the whole case, it is evident that the action of the court below should stand, except as to the judgment for costs. Let the judgment be modified by striking out the allowance of costs, and affirmed in other respects.

POWERS, J., concurred.

ZANE, C. J., took no part in the decision of this case, and expresses no opinion.

(4 Utah, 117)

DENVER & R. G. W. RY. CO. v. STANCLIFF.

Filed June 18, 1885.

PUBLIC LAND—TRESPASSING RAILROAD COMPANY—SUBSEQUENT PATENTEE—CONDEMNATION—BASIS OF VALUE.

A railroad company having built its road over a portion of the public lands, the subsequent patentee of such portion cannot, in condemnation proceedings brought by the company, have the value of the land estimated according to the improvement caused by the location of the property of the company.

Petition for a rehearing.

S. H. Lewis, for appellant.

Bennett, Harkness & Kirkpatrick, for respondent.

BOREMAN, J. The respondent built its road over and across a parcel of land belonging to the United States. The appellant afterwards entered the land, and obtained the government title by patent for it. Thereafter, the respondent instituted proceedings for condemning so much of the land as it was using. The commissioners reported the value of the ground to be \$100 without railway bed, railway, or railway improvements, and \$845 including the railway and railway improvements thereon. The court gave judgment for \$100 damages, and appellant moved for new trial, which, being overruled, he appealed to this court from the order overruling the motion for new trial. Upon a hearing in this court, the order of the court below was affirmed. Thereupon, the appellant, at the January term, 1884, when neither of the present members of the court occupied the bench herein, filed

his motion for a rehearing, which motion, never having been decided, has now been resubmitted to the court.

It is not a wise policy to grant a rehearing in any case, except there be strong reasons therefor. In the case before us no new questions or special reasons are offered why a rehearing should be granted. The grounds of the motion are simply the grounds urged for a reversal of the judgment of the court below, as we view it. But were we to reopen the case, when nothing appears to show that due consideration and weight were not given to the questions on the former hearing, we find the controlling question in the case to be whether, in estimating the damages or compensation to be allowed appellant, the court should have taken into consideration the railway and railway improvements placed upon the land by respondent while it yet remained unclaimed and unoccupied public land, and before appellant had any interest therein, or had obtained government title thereto. Appellant does not claim to have ever bought from the company or from the government the railway or improvements, except that they were fixed to the realty when he purchased the land of the government, and went with the land. It is a general rule that when a person buys land, he buys whatever is fixed to the land as part of the realty. There are, however, some modifications or exceptions to the rule, and the case before us presents one such.

The railroad company, the respondent, is in possession of the railway and railway improvements which the appellant asks pay for. The respondent has never released the possession of or abandoned them, nor been ejected therefrom, but it has by the government and appellant been suffered to retain undisturbed possession of them. The appellant did not place the rails, ties, or other improvements on the land, nor did he ever pay for them or have possession of them. The respondent is seeking the land simply for the purpose of using upon it these and similar improvements. When they were placed upon the land, condemnation could not take place. Now, when condemnation can take place, respondent seeks to compensate appellant, and thus establish its right to a continued use of the land. Under the law the respondent has the right to take the land, paying therefor just compensation. The improvements are to that extent treated as public, and the case is different from that of a private individual putting upon land improvements for his individual use and for no public purpose. Under these circumstances it would be inequitable and unjust to compel respondent to pay for its own improvements. We think that such is the ruling in the great majority of the cases where the question has been raised. *Morgan's Appeal*, 39 Mich. 675; *Toledo Ry. Co. v. Dunlap*, 47 Mich. 456; S. C. 11 N. W. Rep. 271; *Kennedy v. Milwaukee & St. P. Ry. Co.* 22 Wis. 581; *Lyon v. Green Bay & M. Ry. Co.* 42 Wis. 538; *North Hudson Co. R. Co. v. Booraem*, 28 N. J. Eq. 450; *State v. French*, 24 N. J. Law, 736; *Price v. Weehawken Ferry Co.* 31 N. J. Eq. 31.

The fact that respondent, when it built the railway and railway improvements, was a trespasser upon government land, is not material to the issue. The government could have ejected the company, but did not do so. The company became a trespasser, not with a view of permanently holding the land without paying for it, but to hold it temporarily, and until it could be condemned in manner provided by law. Because the company was then a trespasser, it does not follow that it should lose its railroad. It would then have no use for the ground, unless it bought back both the land and the railroad. The motion for a rehearing is denied.

ZANE, C. J., and POWERS, J., concurred.

SUPREME COURT OF NEVADA.

(19 Nev. 149)

EDGECOMB v. HIS CREDITORS.

Filed July 7, 1885.

EXECUTION—EXEMPTION—TERM "LABORER"—LIVERY-STABLE KEEPER.

The keeper of a livery-stable is not a laborer within the meaning of the statute exempting property from execution. LEONARD, J., dissents.

Appeal from the Second judicial district court, Ormsby county. The opinion states the facts.

T. Coffin and *J. D. Torreyson*, for appellants.

A. C. Ellis, for respondent.

HAWLEY, J. The appeal in this case is taken "from an *ex parte* order made in said matter on the eighth day of March, A. D. 1884, by the judge of said county, setting apart for the use and benefit of said insolvent and his family, as exempt from execution, two gray horses and their harness, and one close carriage; and also * * * from two certain orders made * * * on the thirty-first day of May, A. D. 1884, finally exempting and setting apart said horses, harness, and carriage for the benefit of said insolvent and his family as exempt from execution; and denying said creditors' motion to vacate and set aside said *ex parte* order, and sustaining said insolvent's demurrer to said creditors' motion, and denying so much of said assignee's petition for authority to sell the property of said insolvent as prayed for authority to sell said two gray horses and their harness, and said close carriage."

Respondent moves to dismiss this appeal on the ground that it is taken from several different orders, and there is but one undertaking on appeal. This motion must be denied. It was not necessary to specify all the orders and rulings of the court declaring that the property in question was exempt from execution. An appeal from the order made on the thirty-first of May, finally exempting and setting apart said horses, harness, and carriage, would have been sufficient to present the only question involved in this appeal. But the fact that all the rulings of the court upon this question were inserted in the notice of appeal, (including some orders that were not appealable,) does not change the character of the appeal. All the orders relate to the question whether the property specified is or is not exempt from execution, and they must be treated and considered as one order upon that subject, requiring but one undertaking to perfect the appeal. The record shows:

"That said Ezekiel Edgecomb is, and for more than twenty years last past has been, a livery-stable keeper, and for many years prior to the filing of his said petition was engaged in the business of keeping a livery-stable in Carson City, Nevada; that during all of said time he kept numerous horses, carriages, buggies, and other vehicles of his own, suitable for carrying passen-

gers and pleasure-seekers, for the purpose of hiring them or letting them to the public, and also cared for and stabled numerous horses for other persons; that during said time said Edgecomb has frequently and habitually used said close carriage, and said horses and their harness, by using and driving them in person for the purpose of carrying persons about the city of Carson, for the purpose of making social visits and calls, and for the purpose of carrying persons to and from funerals and weddings, and for the purpose of carrying persons to and from all kinds of social gatherings, theaters, concerts, and to and from the railroad depot with light baggage; and that he appropriated the proceeds of such labor and earnings by and with said horses and vehicle to the support of himself and family, and thereby habitually earned a part of his living for himself and family."

The statute under which respondent's claim of exception is based, reads as follows:

"The following property shall be exempt from execution: * * * two oxen, two horses, or two mules, and their harness, and one cart or wagon, by the use of which a cartman, huckster, peddler, teamster, or other laborer habitually earns his living."

Is respondent an "other laborer" within the meaning of that term as used in the statute? The legislature evidently intended that the construction to be given to these words should be confined to other laborers *ejusdem generis* with those named. Language, however general in its form, when used in connection with a particular subject-matter, must be presumed to be used in subordination to that matter, and should be construed and limited accordingly. It is not pretended that respondent comes within any class named in the statute. In order to be entitled to the benefits of the exemption law, he must, therefore, show that he was engaged in some business in which, by the use of his horses, harness, and carriage, he habitually earned his living. He has failed to do so. The record shows that his business was that of a livery-stable keeper, which is plainly distinguishable from that in which cartmen, hucksters, peddlers, or teamsters are engaged. If the legislature had intended to include livery-stable keepers, that class would certainly have been named in the statute, as they are as well known, and of an equal or superior class to those named. It is evident that the words "other laborer" were not intended to include the business of livery-stable keepers.

A livery-stable keeper is not a teamster, or entitled to the exemptions of a teamster, simply because he drives his own team in carrying persons around town. Yet, "in common speech, a teamster is one who drives a team; but, in the sense of the statute, every one who drives a team is not necessarily a teamster, nor is he necessarily not a teamster, unless he drives a team continually. In the sense of the statute, one is a teamster who is engaged with his own team or teams in the business of teaming; that is to say, in the business of hauling freight for other parties, for a consideration, by which he habitually supports himself and family, if he has one. While he need not, perhaps, drive his team in person, yet he must be personally engaged in

the business of teaming habitually, and for the purpose of making a living by that business. If a carpenter, or other mechanic, who occupies his time in labor at his trade, purchases a team or teams, and also carries on the business of teaming by the employment of others, he does not thereby become a teamster in the sense of the statute. So of the miner, farmer, doctor, and minister," (*Brusie v. Griffith*, 34 Cal. 306,) or livery-stable keeper.

In *Dove v. Nunan* the plaintiffs were engaged in business as coal dealers, and used a team, consisting of two horses and a wagon, by hauling coal and other commodities for other people for hire, and the proceeds therefrom were expended in their support. They also occasionally used the team in hauling coal and wood from their own coal-yard to the place where they retailed the coal. Upon these facts the court said:

"The fact that the plaintiffs used the horses and wagon in question as teamsters for hire, and that they expended the money thus received in the support of themselves and their families, did not exempt the property from execution. In order to entitle a party to claim as exempt from execution two horses, * * * he must show that he is a cartman, * * * huckster, peddler, teamster, or other laborer, and that he habitually earns his living by the use of such horses." 62 Cal. 400.

It is matter of common knowledge that the particular business upon which respondent relies is incidental to and connected with the general business of livery-stable keepers, and unless all livery-stable keepers are entitled to have two horses and their harness and one wagon exempt, respondent is not entitled to such exemption. His business was that of a livery-stable keeper and nothing else. His character as a livery-stable keeper was not changed by the fact that the team in question was only used for the particular purpose specified, or from the fact that respondent, in person, always drove the team. If respondent had been engaged in a business that entitled him to claim the exemption, the property would be exempt, although the horses and carriage had been occasionally let for hire to other parties, and would also be exempt, although respondent employed other persons to occasionally drive the team.

The rulings of the district court exempting the property from execution are hereby set aside, and the cause remanded to the district court for such further action as may be necessary in accordance with this opinion.

LEONARD, J., *dissenting*. I think the judgment of the court below should be affirmed. As to the carriage, it is claimed by counsel for appellant that this court is bound to follow the case of *Quigley v. Gorham*, 5 Cal. 418, wherein it was decided that, in the statute, of which ours is a copy, "the term 'wagon' is intended to mean a common vehicle for the transportation of goods, wares, and merchandise of all descriptions," and that "a hackney coach, used for the conveyance of passengers, is a different article, and does not come within

the equity or literal meaning of the act." This court has frequently recognized and followed the well-established rule, subject, however, to equally well-established exceptions, that, in adopting a statute from a sister state, the legislature is presumed to have intended to adopt it as construed by the highest court of that state. One of the exceptions to the rule stated arises when the construction placed upon the statute in a sister state is inconsistent with the spirit and policy of our own laws. *McCutcheon v. People*, 69 Ill. 605; *Cole v. People*, 84 Ill. 218; *Streeter v. People*, 69 Ill. 595; *Rigg v. Wilton*, 13 Ill. 15; *Campbell v. Quinlin*, 3 Scam. 288; *Jamison v. Burton*, 43 Iowa, 285.

It is the policy of our constitution and laws to allow debtors, within reasonable limits, to retain those things that are necessary to enable them to enjoy the necessary comforts of life, and to carry on their usual employments. *Elder v. Williams*, 16 Nev. 423; Const. art. 1, § 14; 1 Comp. Laws, 1282. It is within the spirit and policy of our constitution and laws, and according to the almost universal practice of courts, to construe exemption laws liberally. "Wherever this rule or policy prevails, and it does not clearly appear whether certain property is or is not embraced within the exempting statute, the debtor will generally be allowed the benefit of the doubt, and suffered to retain the property." *Freem. Ex'ns*, § 208. In the case of *Quigley v. Gorham* the strictest construction possible was adopted. The word "wagon" was declared to have been used by the legislature in its primary sense only. The constitution provides that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities hereafter contracted." Of course, it is the duty of the legislature to declare the kind and amount of property that shall be exempt; but, when that has been done, it is the duty of courts to carry out the constitutional policy by including among the exempted articles anything which, by a liberal construction of the statute, may be embraced by the words, and which must be saved for the debtor's use in order to accomplish the object of the legislature.

I have no doubt that the legislature intended to exempt two animals, with their harness or other equipments, and any suitable vehicle, by the use of which any person habitually earns his living, and to the exercise of whose business such animals, etc., are necessary. No good reason can be given why a carrier of passengers should not have the means of support as well as the carrier of goods, wares, and merchandise. He is one of a class of persons whose living depends upon the use of a team, and that class the legislature intended to protect by the statute under consideration. To say that the carrier of passengers is not entitled to be protected simply because the vehicle named is "a wagon," is following the letter rather than the spirit of the statute; it is considering the wording instead of the object of the statute. In view of the liberal construction everywhere given to

exemption laws under constitutions and statutes like ours, the word "wagon" is sufficiently comprehensive to include all four-wheeled vehicles used for the transportation of persons or things. *Freem. Ex'ns*, § 228; *Allen v. Coates*, 29 Minn. 48; S. C. 11 N. W. Rep. 132; *Rodgers v. Ferguson*, 32 Tex. 533; *Nichols v. Claiborne*, 39 Tex. 363.

Many analogous cases may be cited showing the spirit and policy of such statutes. In Arkansas, where the statute extended the exemption to "free white citizens," the word "citizen," as there used, was held to be equivalent to "resident" or "inhabitant." *McKenzie v. Murphy*, 24 Ark. 155; and see *Cobbs v. Coleman*, 14 Tex. 594. Webster defines a "team" to be "two or more beasts harnessed together to the same vehicle for drawing;" yet, under the term "team," in exemption statutes, in numerous instances, a single animal has been held exempt. In those cases the courts said the intent of the legislature was to protect the debtor in the use of his means of making a living; and the intent that would exempt a whole team would also exempt half. They followed the spirit rather than the letter of the statute. And so many courts have made the word "team" include the vehicle drawn by it, and the term "horse" to include a saddle, bridle, stake-rope, and martingale, although the latter articles were not mentioned in the statute, upon the principle that an exemption of a horse carried with it everything essential to its beneficial enjoyment.

In *Mundell v. Hammond*, 40 Vt. 641, two calves nine months old were saved to the debtor, under a statute exempting "a yoke of oxen or steers." In *Mallory v. Berry*, 16 Kan. 293, a wild unbroken steer, 20 months old, was held exempt under a statute exempting "a yoke of oxen." In *Favers v. Glass*, 22 Ala. 624, a cart was held to include a four-wheeled wagon. In Texas, under a statute exempting "two horses," a horse and mule are exempt. *Allison v. Brookshire*, 38 Tex. 200. In Tennessee, a jackass is exempt, under a statute exempting "a horse, mule, or yoke of oxen." *Richardson v. Duncan*, 2 Heisk. 220; and see *Webb v. Brandon*, 4 Heisk. 288; *Freeman v. Carpenter*, 10 Vt. 433; *Wilcox v. Hawley*, 31 N. Y. 655.

Believing that the decision in question is opposed to the spirit and policy of our constitution and laws, and that it does not express the intention of the legislature, I do not feel bound to follow it. As I understand the decision of the court, the entire property in question is held not to be exempt, because it is, in fact, a part of the livery-stable outfit, and respondent, being a livery-stable keeper, is not one of the persons entitled to exemption, since he is not, in the sense of the statute, either a "cartman, huckster, peddler, teamster, or other laborer," although by the use of this property he habitually earned his living in part, just as he did with the other property in the stable. I do not think it was any part of the livery-stable, and I do think respondent is a laborer, in the sense of the statute, who habitually earned his living by the use of this property. Respondent was a liv-

livery-stable keeper, because he kept horses and vehicles for the purpose of letting them to the public for compensation, and he boarded horses for others. But the property in controversy was not so used. He neither let nor offered to let it to others. So far as this team is concerned, he was a private carrier of persons or passengers. Redf. Carr. § 19; Schouler, Bailm. 590; Ang. Carr. § 46.

This team was set apart for a use entirely different from that to which the others were put,—as much so as it would have been if kept for the same purpose at another stable in a different part of the town. If respondent had had this team only, or a dozen others like it, and had used the one in question, or all, as he did this, no one could say he kept a livery-stable. If he had kept in his stable a span of horses simply, and only to haul merchandise from the depot to stores, those horses would not have been a part of his livery-stable, any more than a yoke of oxen kept for the same purpose would have been. Livery-stable keepers often do many things outside of that business, because it is convenient and profitable to do so.

There is a livery-stable kept in Carson by men who also run a daily stage to Lake Tahoe. The stage-horses are kept at the stable, but they are used exclusively in stage work,—a business entirely foreign to livery business proper. Should a two-horse stage team be claimed as exempt under the statute quoted in the court's decision, it does not seem to me that it could be regarded as a part of the livery-stable, or that the validity of a claim of exception would depend upon whether livery-stable keepers are entitled to an exemption.

There is a man in Carson who runs an express wagon. He carries trunks and packages to and from the depot, and elsewhere. He has two horses, their harness, and a wagon, by the use of which he habitually earns his living. His team is now exempt. Suppose he should buy out a livery-stable, carry on that business, and besides that of expressman, with the team he now uses, keeping the express team at the stable. Now, admitting for the present that as a livery-stable keeper none of his livery teams would be exempt, why would he not be as much entitled to claim exemption for his express team as he was before purchasing the livery-stable? Is he to be deprived of an expressman's exemption simply because he is a livery-stable keeper also, and because a livery-stable keeper cannot claim an exemption? It may be that the property in question would not have been exempt, unless a livery-stable keeper may claim exemption, if respondent had used it in part as livery property,—had let it for hire to other parties,—and partly as he did use it. But, in view of the liberal construction that should be given to exemption statutes, in deciding whether respondent was a "cartman, huckster, peddler, teamster, or other laborer," I insist that the test should be the use to which he put *this* property.

Oftentimes a man is obliged, and he has always a right, to carry on different kinds of business. He may be a carpenter and joiner

and a painter, a wagon-maker and blacksmith, a physician and dentist, a lawyer and minister. Whether persons so engaged in two different kinds of business can claim an exemption for each occupation or profession need not be discussed, because it is not shown that respondent claimed or had the benefit of any exemption except the team in question, and such other property as is accorded to all debtors regardless of their occupations. But the mere fact that a debtor carries on two or more kinds of business or professions does not deprive him of all exemptions. Nor, under our statute, must the exempted articles belong to the business in which he is *principally* engaged, as in the case under the Michigan statute, (*Morrill v. Seymour*, 3 Mich. 67.) In this state, I think that when a person engages in different pursuits, either of which, if pursuing that avocation alone, would entitle him to an exemption, he may, at least, choose from which business the articles exempted shall belong; and if he is engaged in two kinds of business, only one of which entitles him to favor, he may claim the exemption given under that one the same as though he was engaged in no other. The fact that the use to which the property in dispute was put is "incidental to and connected with the general business of livery-stable keepers," does not, as to this property, make him a livery-stable keeper. By our statute a livery-stable keeper is one "who keeps horses or carriages for rent or hire." 2 Comp. Laws, 3186; St. 1861, p. 71, § 79.

"Any person whose business is to keep horses for hire or to let, or to keep, feed, or board horses for others, shall be regarded as a livery-stable keeper." 14 St. at Large, 116.

With this property respondent habitually earned his living in part, not as a livery-stable keeper, but as a private carrier of persons and passengers, and it is just as much entitled to exemption as it would have been if he had not run a livery-stable with other property. If it is true, as the court decides, that a livery-stable keeper is not entitled to an exemption, then that fact is an additional reason in favor of the view I take; because, otherwise, respondent will be deprived of all instrumentalities of productive labor, while other laborers, who habitually earn their living by the use of horses, oxen, or mules, and to the exercise of whose business such animals are necessary, may enjoy property that is just as necessary for his support as it is to theirs.

"The manifest requirement of the constitution is that the exemption laws should be so framed that all classes of debtors should, as nearly as may be, participate equally in their benefits. We believe our exemption laws were framed and enacted in the spirit of that requirement. Looking through these statutes we find no adequate provision in favor of merchants or shop-keepers as a class, unless it is contained in the statute under consideration. Their little stock in trade may be as indispensable to the support of their families as are the tools of the mechanic or miner, the press and type of the

printer, or the library of the lawyer. Why should they not have the same protection as the others? And when we find language in a statute which may fairly be construed as giving them the same protection extended to other classes of debtors, why should not that construction be adopted?" *Wicker v. Comstock*, 52 Wis. 318; S. C. 9 N. W. Rep. 25.

My opinion is that respondent, as a carrier of passengers, is entitled to the exemption claimed, because, in the sense of the statute, he is a "laborer" who habitually earns his living by the use of the property in dispute, although he is also a livery-stable keeper, and as such is not entitled to an exemption. But I think, also, that if this property is a part of the livery-stable outfit, still respondent, as a livery-stable keeper, is entitled to the benefit of the statute. I agree with the court in saying that, "in order to be entitled to the benefit of the exemption law, respondent must show that he was engaged in some business, in which, by the use of his horses, harness, and carriage, he habitually earned his living." It is not and cannot be said that a livery-stable keeper does not fill this requirement. Of all occupations there is none in which a man must so signally fail, if deprived of the use of horses, harness, and carriages, as that of a livery-stable keeper. His entire business depends upon their use; without them his occupation is gone. True, he does not drive his own teams; but that is admitted to be unnecessary.

"The words 'used by the debtor in obtaining the support of his family' are general, and restricted to no particular mode of use. They are answered when the team is hired to others for a compensation, which compensation goes into the general fund to support the family, as well as where the debtor himself goes with the team as its driver, and adds the earnings of his labor to that of the team." *Washburn v. Goodheart*, 88 Ill. 231; *Elder v. Williams*, 16 Nev. 420.

But it is said that, in the sense of the statute, respondent is not embraced by the words "other laborer," because a livery-stable keeper is not *ejusdem generis* with "cartman, huckster, peddler, and teamster." The four words used in the statute are not themselves *ejusdem generis* except in one sense. They have but one characteristic common to all, which is that they specify persons in whose business a team is absolutely essential. To that extent only were they intended to be *ejusdem generis*. What other common feature is there between a cartman or teamster, and a peddler? To the extent just stated a livery-stable keeper is *ejusdem generis* with those named. In *U. S. v. Lawrence*, 13 Blatchf. 212, the defendant was indicted for forgery under a statute which provided a penalty for the forging of "any bid, proposal, guaranty, official bond, public record, affidavit, or other writing." The court said

"The first position taken in support of the demurrer is that the rule of construction, according to which general words are restricted by particular words, should be applied to this statute, and the meaning of the words 'other

writings,' in this provision, restricted so as to exclude from the operation of the statute such writings as are set forth in this indictment. The rule here invoked is not an arbitrary rule, but one of many resorted to for the ascertainment of the intent of the legislature, when such intent is not otherwise apparent. To apply it to all general words would often defeat the intention of the legislature, and such, in my opinion, would be the effect if applied to this statute. Nothing in the language used, nor in the mischiefs intended to be remedied, nor in the circumstances under which the statute was enacted, indicates that the words 'other writings' were used in a restricted sense, but the contrary. Various writings are mentioned, but these writings have no common object, nor any characteristic features common to all, from which to infer an intention to restrict the effect of the provision to any particular class of writings. The language of the statute furnishes, therefore, no criterion by which to restrict its general words."

In *Wicker v. Comstock*, *supra*, the court construed a statute which exempted "the tools and implements, or stock in trade, of any mechanic, miner, or other person, used or kept for the purpose of carrying on his trade or business, not exceeding \$200 in value." It was claimed by the defendant that the term "or other person" should be interpreted to mean only a person *ejusdem generis*; that is, an artificer of some sort, and not a merchant merely. The court said:

"* * * We conclude that the maxim *noscitur a sociis* is satisfied by restricting the operation of the statute to those debtors who, although not artificers, must necessarily keep and use a stock in trade in carrying on their business, and who are not protected by other special provisions of the statute. This construction entitles the plaintiff to the exemption claimed." And see *McAde v. Thompson*, 27 Minn. 135; S. C. 6 N. W. REP. 479; *Burgess v. Everett*, 9 Ohio St. 426.

The court is of opinion that livery-stable keepers would have been named in the statute if the legislative intent had been to include them. I do not think there was any effort or desire to name all or nearly all whom the statute was intended to favor. It would not be difficult to designate many, not mentioned, who come within the statute.

For the reasons above stated I dissent from the decision of the court.

SUPREME COURT OF KANSAS.

(33 Kan. 765)

STEBBINS v. WOLF.

Filed July 9, 1885.

1. VENDOR AND VENDEE—BREACH OF COVENANT OF WARRANTY—MEASURE OF DAMAGES.

In an action to recover damages for a breach of the covenant of warranty, where the warrantee has been evicted, the measure of damages, as a general rule, is the value of the land as agreed upon at the time of the conveyance, with interest thereon, together with such reasonable costs and expenses as he has fairly and in good faith incurred in defending his title and in resisting eviction.

2. SAME—INTEREST ON CONSIDERATION MONEY.

Interest upon the consideration money is given to counterbalance the mesne profits which the real owner may recover, and therefore, for such time as the warrantee occupies and enjoys the use of the premises without liability to the owner of the paramount title, no interest is recoverable.

3. SAME—TAX TITLE—RECOVERY OF TAXES PAID.

The vendor of the land held under tax deed, and in an action wherein the judgment of eviction was rendered, the vendee recovered from the owner of the paramount title all taxes paid by the vendor, with interest at the statutory rate up to the time of eviction. *Held*, that the amount so received by the vendee should be allowed to the vendor in reduction of the damages for the breach of his covenant of warranty.

Error from Atchison county.

Action brought by Gottlieb Wolf against W. R. Stebbins to recover damages for a breach of the covenant of warranty in a deed of real estate from plaintiff to defendant, situate in Doniphan county, Kansas. The action was tried in the district court of Atchison county, without a jury, at its November term, A. D. 1883, upon an agreed statement of facts, which are as follows:

"(1) That the land described in the plaintiff's petition was subject to taxation for the year 1871, and assessed, and, the taxes remaining unpaid, was sold for such taxes on the first Tuesday of May, 1872, and at such sale was purchased by said G. I. & W. R. Stebbins, then partners in business under said name.

"(2) That on the eighteenth day of November, 1875, the county clerk of Doniphan county, Kansas, made, executed, acknowledged, and delivered to said G. I. and W. R. Stebbins a tax deed to said premises, which deed was recorded in the office of the register of deeds of said Doniphan county, on the twentieth day of November, 1875, but which deed was held to be, by the district court of said county, void upon its face, and set aside; that said G. I. and W. R. Stebbins obtained another tax deed to said premises from said clerk, in due form, on November 30, 1876, which was also set aside as defective; that said Stebbins paid the subsequent taxes on said land, for each year, down to and including the first half of the year 1876, under and by virtue of the tax-sale certificate and deed.

"(3) That at the date of said sale for taxes and tax deeds, and prior and subsequent thereto, the original or patent title to said land was in Elizabeth W. Long.

"(4) That at the September term of the district court of Doniphan county, Kansas, A. D. 1876, said G. I. and W. R. Stebbins obtained a judgment and

decree against said Elizabeth W. Long, in a suit therefor, quieting their title to said land, and excluding said Long from all interest therein.

"(5) On the twenty-fifth day of November, 1876, said G. I. and W. R. Stebbins sold said real estate to the plaintiff herein, Gottlieb Wolf, for the consideration of three hundred and seventy-five dollars, of which sum \$25 in cash was paid at the time of said sale, and said Wolf and wife gave to said W. R. Stebbins their note and mortgage on said land for \$350, balance of purchase money, and on same day said G. I. and W. R. Stebbins executed and delivered to said Wolf a deed of general warranty to said land, a true copy of which is attached to plaintiff's petition as an exhibit; that said mortgage for \$350 residue was assigned to Brown & Bier, which was subsequently paid out of moneys recovered from said Long for taxes paid on said land, and the interest thereon.

"(6) On August 23, 1877, said Elizabeth W. Long filed her motion in the district court of Doniphan county, Kansas, to vacate and set aside said judgment and decree obtained by said G. I. and W. R. Stebbins, quieting their title to said land, as irregular and void, and at the September term of said court, 1877, upon due notice to said Stebbins, and hearing, said motion was sustained, and said judgment and decree vacated and set aside.

"(7) On April 27, 1879, Elizabeth W. Long filed her petition in the district court of Doniphan county, Kansas, against Gottlieb Wolf, plaintiff herein, then in possession, to recover said land, and the rents and profits thereof, and on the final trial, had in said court on the sixteenth day of September, 1881, at the September term of said court, 1881, the said Long obtained judgment and decree for the title and possession of said land, and adjudging the title and right of possession to be in said Long; the court denying and refusing the claim of said Long for rents and profits of said land prior to the notice by service of summons on said Wolf in said action, to-wit, May 27, 1879, and adjudging that said Wolf was entitled to the benefit of the occupying claimant's law for all permanent improvements made on said land, and to all taxes paid, and interest thereon, before said Long should be let into possession; that said Wolf was evicted from said lands by judgment of said court on April 1, A. D. 1882.

"(8) The certified copy of the journal entry of the judgment and decree in said cause, in said court, and the verdict and the assessment of the sheriff's jury, with the orders and the judgment of the court thereon, and receipts for moneys paid, is hereto attached, and agreed to be correct; but the same is to be introduced in evidence as part of the facts in the case, upon ruling of the court that the same, or some portion or portions thereof, is competent and relevant and material evidence in this case, and then only such competent part shall be admitted.

"(9) That said note and mortgage for \$350 and interest, the whole amounting to \$398.50, which was given by Wolf and wife to said W. R. Stebbins, and by him assigned to said Brown & Bier, was paid in full by said Wolf out of moneys received from said Long for taxes paid on said land by said Wolf and grantors, and for improvements thereon; that said Wolf also paid costs in said action amounting to \$164.70; that said Wolf expended in time and money, while attending said trial, the sum of \$30.

"(10) That when said suit of *Long v. said Wolf* was commenced for the purpose of evicting said Wolf from said land, and Wolf duly and legally notified said W. R. Stebbins to defend said suit, which notice said W. R. Stebbins complied with, and defended the same for himself, in the name of said Wolf—F. D. Mills, Esq., appearing as said Stebbins' attorney; that said W. R. Stebbins paid all attorney's fees and costs in said suit, including fees and costs in the supreme court, except the \$164.70 costs as aforesaid; that said Wolf received the sum of \$234.70 in money out of money recovered from said Long for taxes paid and for improvements made on said land, of which

amount—\$234.70—\$105 was for improvements made on said land by said Wolf. Said amount of \$234.70 is included in the receipts mentioned in the eighth statement of facts.

"(11) That the whole amount of taxes paid on said land by said Stebbins and said Gottlieb Wolf, together with interest as allowed by law, and recovered of said Long in said case, is the sum of \$692.90, which amount includes also costs of tax deeds and recording same; that the amount of said taxes paid by said Wolf, together with the interest thereon allowed by law, is \$129.08; that the amount of said taxes paid by said Stebbins, together with interest thereon at the rate of fifty per cent. per annum from date of payment up to and including November 30, 1876, is \$277.12; that said last-mentioned sum of \$277.12, with interest thereon from said November 30, 1876, to September 16, 1881, at the rate of 20 per cent. per annum, amounts to \$543.17; from September 16, 1881, to April 1, 1882, is the sum of \$20.60.

"(12) That the value of said lands, with the improvements thereon, at the date of eviction, April 1, 1882, was the sum of \$2,300.

"(13) That the value of the improvements put upon said property and lands by said Wolf, plaintiff herein, since November 25, 1876, and prior to date of commencement of said suit by said Long to evict said Wolf, to-wit, May 27, 1877, is \$705."

In addition to the facts above stated, there was submitted portions of the record in the case of *Long v. Wolf*, and which are referred to in the eight paragraph of the above statement. Upon the facts thus agreed to and submitted, the court made the following conclusions of law:

"(1) The plaintiff is entitled to recover of said defendant the sum of \$97.88, being the excess of the purchase price of the land over the defendant's lien, and the interest thereon.

"(2) The plaintiff is also entitled to interest on said sum at the rate of 7 per cent. per annum from November 26, 1876, up to the present time, being \$47.58.

"(3) The plaintiff is also entitled to recover of the said defendant the sum of \$194.70, being \$164.70 costs and \$30 for time and expenses, with interest thereon from the commencement of this action up to the present time, being \$17.38.

"(4) The plaintiff is also entitled to recover of said defendant the costs of this action.

"(5) The plaintiff is not entitled to recover of said defendant any other or further sum whatever than these mentioned in conclusions of law 1, 2, 3, and 4."

Motions were made by both the plaintiff and the defendant for a new trial, which were overruled. The court, after modifying the finding of the amount due plaintiff by adding the sum of \$4.40 for interest upon the costs and expenses paid by the plaintiff, entered judgment in his favor for the sum of \$361.49. Both of the parties excepted to the rulings of the court, and bring the case here for review.

Mills & Wells, for plaintiff in error.

Hudson & Tufts, for defendant in error.

JOHNSTON, J. One of the disputed points in this case is in regard to the measure of damages for a breach of the covenant of warranty in the conveyance of real estate. The land was purchased from Stebbins by Gottlieb Wolf on November 26, 1876, and the consideration

agreed to be paid was \$375. He held possession of the land from that time until April 1, 1882, when he was evicted by the owner of the paramount title, Elizabeth Long. The value of the land at the time of the eviction was \$2,300.

Wolf insists that the measure of damages is the value of the land at the time of eviction, while the other party contends that the agreed value of the land at the time it was conveyed is the true rule for assessing the damages. The latter theory is substantially the one adopted by the trial court. It was held that the purchaser was entitled to the consideration paid for the land, with interest thereon from the time of conveyance, together with reasonable costs and expenses incurred by the purchaser in defending his title, allowing the vendor credit for such benefits as the purchaser derived from the conveyance, and for which he was not answerable to the owner of the paramount title.

There is some conflict of decision upon the rule for assessing damages in such a case, but the weight of authority supports the theory which the court below adopted. Rawle, Cov. (4th Ed.) 242, and cases cited; 3 Washb. Real Prop. 423; 2 Suth. Dam. 280; 1 Sedg. Dam. 338, and note.

In this country the value of land fluctuates, and is frequently enhanced to an enormous extent. The construction of a railroad near to, or the building of a town upon, the land, or other adventitious circumstances occurring between the sale and the discovery of the defective title, might enhance its value a hundred fold, and to require the vendor to pay such increased value would be a hardship and an injustice. The rule measuring the damages by the value of the land, as agreed upon by the parties at the time of its alienation, is more reasonable and just, and while this general rule is subject to modification by circumstances, we think it is applicable to the facts in this case.

The plaintiff in error, W. R. Stebbins, complains of the rulings of the court—*First*, in allowing Wolf interest on the consideration money for the whole time from the date of the deed till the eviction; and, *second*, in failing to set off the full benefits which Wolf derived from the tax lien, and the moneys paid thereon by Long in the ejectment action, in reduction of damages in this action.

In respect to interest on the purchase price of the land, it appears that Wolf entered upon and held possession of the land from the time of its purchase down until April 1, 1882, when he was evicted in the suit brought against him by Elizabeth Long. In that action he was held to account to Long for the rents and profits of the land from the service of the summons on May 27, 1879. From the time of the sale until the last-named date, the rents and profits arising from his possession and use of the land amounted to \$160. He was not required to account to Long for the use of the land during this period, and as interest is given to counterbalance the claim of the true owner for

mesne profits, we think Wolf ought not to recover interest on the consideration money while he had the use of the premises free of expense. The rule in regard to the recovery of interest as an item of damages has been well stated as follows:

"Interest is not recovered when the premises have been occupied by the warrantee, and he has not accounted nor is accountable for the rents and profits. It would be unjust. He who buys a farm, or house and lot, agrees to part with the use of the consideration forever, for the use of the farm, or house and lot, forever. As long as he has the use of the farm, or house and lot, so long should the seller have the use of the consideration. In such case, the use and occupation are presumed to be equal to the use of the purchase money, and if not, the grantee has no ground for complaint while he is undisturbed in the enjoyment of that for which he was content to pay the purchase money." 2 Suth. Dam. 300. See, also, *Combs v. Tarlton's Adm'rs*, 2 Dana, 465; *Wead v. Larkin*, 49 Ill. 99; *Thompson's Heirs v. Jones*, 11 B. Mon. 365; *Clark v. Parr*, 14 Ohio, 121; *Whiting v. Dewey*, 15 Pick. 428; 2 Wait. Act. & Def. 401.

We think, therefore, that Wolf ought to be limited in his recovery of damages, on account of interest on the purchase money, to that which would accrue after the service of the summons upon him in the ejectment action, during which time he was held to account for mesne profits arising from the use and occupation of the premises, and which amounts to \$74.67.

Upon the other assignment of error by Stebbins, the agreed facts show that Stebbins held the land under a tax deed. The lands were sold to him for the unpaid taxes of 1871, and he paid the subsequent taxes and charges on the lands down to and including the semi-annual payment of taxes in 1876. After that time the taxes levied against the land were paid by Wolf. In the ejectment action, in which the judgment of eviction was rendered, Wolf not only received the benefit of all lasting and valuable improvements made upon the land, but he recovered from Long, upon the tax lien against the premises, the total sum of \$692.90. Of this sum, \$563.77 was paid to him by reason of the taxes which Stebbins had paid upon the land, and the liberal interest allowed thereon by the statute of the state. The court, however, did not allow Stebbins this amount in reduction of damages for the breach of the warranty, but only credited him with \$277.12, being the amount of Stebbins' tax-title interest in the land at the time of its sale. In this, we think, there was error. Generally, the warrantor is entitled to all the benefits which the purchaser derives from the defective conveyance, in reduction of the amount of recovery against him for a breach of the warranty. It was solely by reason of the tax title and interest conveyed by Stebbins that Wolf received so large a sum of money from Long.

The statute for the recovery of taxes provides that where the holder of a tax deed, or any one claiming under him by virtue of such deed, is defeated in an action for the recovery of the land sold, the successful party, before being let into possession, shall be required to pay to

the other party not only the amount of the taxes, interest, and costs which have accrued up to the date of the tax deed, but also interest thereafter on the total amount at the high rate of 20 per cent. per annum. The tax interest or lien conveyed to Wolf by Stebbins rapidly increased on account of this large rate of interest. It was a benefit which flowed directly from the defective conveyance made to Wolf, and as he is not held to account for this benefit to any one else, it should be considered in assessing the damages in a suit upon the covenant of warranty against the vendor. *King v. Kerr*, 5 Ohio, 155; *Booker's Adm'r v. Bell's Ex'rs*, 3 Bibb, 173. We are therefore of opinion that Stebbins is entitled to a credit, by way of reduction of damages, to the taxes paid by him, together with all interest which had accrued thereon up to the time of judgment in the action wherein these taxes and interest were paid to Wolf.

We are further of the opinion that the item of \$194.70, allowed by the trial court to Wolf for costs and expenses, was incurred by him in good faith in defending the ejectment action brought by Long against him, and is a reasonable and proper charge against the defendant in this case. Measuring the damages, then, by the rules stated, we find, under the agreed statement of facts, that the items of damages chargeable against Stebbins, at the time of the eviction of Wolf, are as follows:

The purchase price of the land at the time of sale, -	\$375 00
Interest on the purchase price from May 27, 1879, -	74 67
Costs and expenses in defending suit wherein judgment of eviction was rendered, -	194 70
Total, -	\$644 37
Deduct amount received by Wolf for taxes paid by Stebbins, and interest thereon, -	563 77
Amount due Wolf April 1, 1882, -	\$ 80 60

Wolf is, therefore, only entitled to a judgment for this balance, together with the interest thereon at 7 per cent. until November 12, 1883, the date of judgment in this case, which amounts to \$89.66. The judgment of the district court will therefore be modified by awarding judgment in favor of the plaintiff, Wolf, for \$89.66. The costs in this court will be divided.

(All the justices concurring.)

(34 Kan. 42)

BURCHFIELD and others v. HAFLEY.

Filed July 9, 1885.

1. BOND — ACTION FOR BREACH OF CONTRACT TO CARRY MAIL — MEASURE OF DAMAGES.

Where a party sublets a contract to another person to carry the United States mail over a specified route, and the subcontractor executes a penal bond, with sureties, that he will fully and faithfully perform the mail service as provided in his contract, and, after carrying the mail a short time, refuses and ceases to carry the mail, without giving any notice to the original contractor, and the contract is canceled by the post-office department of the United States in accordance with the rules of the department, the original contractor is entitled to recover from the sureties on the bond, as his measure of damages, the amount he would have received from the United States during the time the subcontractor was to carry the mail, according to the terms of his contract, from the time he ceased to carry the same, less the amount he was to pay for the service, not to exceed the penalty of the bond, with interest thereon at the rate of 7 per cent. per annum from the time the original contractor made demand of such sureties therefor.

2. SAME—INTEREST.

In an action on a penal bond, interest, as damages, may be allowed beyond the penalty. The penalty is the limit of liability at the time of the breach of the bond. The law gives interest for the delay in payment, and therefore for the misconduct of the sureties.

3. SAME—CASE OVERRULED.

Simmons v. Garrett, McCahon, 82, (Dassler's Ed. 1 Kan. 511,) overruled.

Error from Greenwood county.

Action commenced June 8, 1883, by C. J. Haffey against H. B. Gurnsey, J. Q. Burchfield, I. A. Powell, S. B. Oberlander, H. A. Lauman, Thomas Farrell, and J. E. Allen, to recover \$300, with interest from October 1, 1880, at 7 per cent. per annum. In his petition Haffey alleged the execution of the following contract:

"Witnesseth, that I, H. B. Gurnsey, have this day agreed, and by this instrument do bind myself unto C. J. Haffey, to carry the United States mail from Elk Falls to Howard, on route No. 33,239, state of Kansas, commencing on the nineteenth day of May, 1880, and ending on the thirty-first day of June, 1882, performing said services according to the schedule ordered by the post-office department for said route.

"Now, in consideration of the above being fully and faithfully performed, then it is agreed by the said C. J. Haffey that he will pay or cause to be paid to the said H. B. Gurnsey the sum of one dollar per annum.

"H. B. GURNSEY.

"Signed this nineteenth day of May, 1880, before me, clerk of the district court, Elk county, Kansas.

ASA THOMPSON, Clerk."

[Seal]

And also the following bond:

"Whereas, H. B. Gurnsey, of Elk Falls, Kansas, has entered into an agreement with C. J. Haffey, of Eureka, Kansas, to-wit, to carry the United States mail from Elk Falls to Howard, on route No. 33,239, state of Kansas, for the sum of one dollar per annum, commencing on the nineteenth day of May, 1880, and ending on the thirty-first day of June, 1882: Therefore, we, H. B. Gurnsey, as principal, and J. Q. Burchfield, I. A. Powell, S. B. Oberlander, H. A. Lauman, Thomas Farrell, and J. E. Allen, as sureties, do, by this instrument, firmly bind ourselves, our heirs, and assigns, in the sum of three

hundred dollars, in good and lawful money of the United States, to be paid to C. J. Haffey, his heirs or assigns, on demand: provided, however, that if the said H. B. Gurnsey fully and faithfully perform the mail service herein described, then this bond becomes null and void; otherwise, to remain in full force.

H. B. GURNSEY.

"I. A. POWELL.

"H. A. LAUMAN.

"J. E. ALLEN.

"J. Q. BURCHFIELD.

"S. B. OBERLANDER.

"THOS. FARRELL.

"Signed on this nineteenth day of May, 1880, before me, clerk of the district court, Elk county, Kansas.

[Seal]

"ASA THOMPSON, Clerk."

Gurnsey carried the mail a short time, and then declined to comply further with the terms of the contract. A few days after Gurnsey ceased to carry the mail, the post-office department canceled the contract, and plaintiff demanded damages on account of the cancellation of the contract. To this petition the defendant interposed a demurrer, which was overruled; and they then answered, admitting the execution of the bond, but denied all the other allegations of the petition. They also objected to the introduction of any evidence under the petition, for the reason that it stated no cause of action. Trial at the December term for 1883, before the court with a jury. The jury returned a verdict for plaintiff for \$358.35. Defendants filed a motion for a new trial, which was overruled, and judgment entered upon the verdict. Defendants excepted, and bring the case here.

S. S. Kirkpatrick, for plaintiffs in error.

Clogston & Fuller, for defendant in error.

HORTON, C. J. Upon the trial, the court charged the jury as follows:

"If you find from the evidence that Gurnsey did not notify Haffey of his failure to comply with the terms of his contract, and that Haffey was not informed of that fact until he received notice that his contract had been canceled, the measure of his damages is the amount he would have received from the United States during the time Gurnsey was to carry the mail, according to the terms of his contract, from the time he ceased to carry the same, less the amount he was to pay Gurnsey for said service, not to exceed the sum of three hundred dollars, with interest thereon at the rate of seven per cent. per annum from the time Haffey made demand of the defendants therefor."

Complaint is made of this direction. We do not think the jury were misdirected. Haffey was entitled, as his damages, to what he lost by the refusal of Gurnsey to perform his contract of May 19, 1880, not exceeding the amount of the bond. He had no opportunity to supply the service after Gurnsey's refusal. When they signed the bond the sureties should have known that under the rules of the post-office department, if the mail was not carried as provided by the contract, the contract might be canceled. There is a conflict in the authorities upon the question of allowing interest as damages beyond the penalty of the bond. The weight of American authority,

however, is in favor of allowing interest. Sutherland, in his work on Damages, says:

"The penalty is the limit of liability at the time of the breach. Interest is afterwards given, not on the ground of contract, but as damages for its violation; for delay of payment after the duty to pay damages for breach of the condition to the amount of the penalty had attached." Volume 2, pp. 14-19.

In the notes to Sedgwick on Damages it is stated:

"In the case of debt on bonds for the payment of money only, it seems now settled that interest may be recovered after default even though it exceeds the penalty, and whether the action be against principal or surety." Volume 2, (7th Ed.) 261-264.

The penalty of the bond covers the misconduct of the principal; but the interest allowed on the penalty is for the misconduct of the sureties,—for the delay in payment. If the damages were paid when due they would have earned interest. The statute provides:

"Creditors shall be allowed to receive interest at the rate of seven per cent. per annum, when no other rate of interest is agreed upon, for any money after it becomes due; * * * and for money due and withheld by an unreasonable and vexatious delay of payment." Section 1, c. 51, Comp. Laws 1879.

The authorities upon the question of allowing interest, even though it exceeds the penalty, are collected in the notes to the text cited, and to them we refer. Our attention is called to the case of *Simmons v. Garrett, McCahon*, 82. In view of the provisions of the present statute concerning interest, and the weight of the current authorities, that decision, rendered over 20 years ago, is not satisfactory to us, and therefore must be overruled.

We have examined the other questions submitted, but find nothing tenable against the rulings of the trial court. .

The judgment of the district court must be affirmed.

(All the justices concurring.)

(33 Kan. 726)

McGONIGLE v. ATCHISON.

Filed July 9, 1885.

1. TRESPASS—BRINGING SAND FROM MISSOURI INTO KANSAS.

Where a mere wrong-doer enters upon land in the state of Missouri and severs sand therefrom, and transports it to Kansas, and there converts it to his own use, the sand remains the property of the owner of the land up to the time of the conversion, and he may afterwards recover from the wrong-doer the value of the sand in an action brought in Kansas, such action being transitory.

2. SAME—DEFENSE.

And in such action the plaintiff may recover notwithstanding the fact that the petition may state facts sufficient to constitute a cause of action, not only in the nature of trespass *de bonis asportatis* and trover, but also in the nature of trespass *quare clausum fregit*.

3. SAME—WAIVER OF TORT—RECOVERY OF VALUE OF SAND.

In such action the plaintiff may waive so much of the tort as relates to the trespass upon the real estate, and ask to recover only for the value of the sand.

Error from Leavenworth county.

Thos. P. Fenlon, for plaintiff in error.

J. H. Gilpatrick and Lucien Baker, for defendant in error.

VALENTINE, J. This case has been brought to this court upon a "case made" which is a model of brevity and clearness, and reflects great credit upon the able counsel who prepared it. The case has also been very ably presented to this court by counsel on both sides, and if we should err in its decision it will not be their fault. The amount involved in this controversy seems to be small and trifling, but the principles involved are supposed to be of vital importance; and counsel for plaintiff in error, defendant below, says that the decision of the case involves the possible liability for not only many dollars, but many hundreds of thousands of dollars. We have, therefore, given the case a very careful consideration.

The record of the case, as presented to this court, shows that, on October 4, 1883, David Atchison filed his petition in the district court of Leavenworth county, Kansas, in which petition he alleged, among other things, that he was then, and had been for more than five years, the legal and equitable owner of a certain piece of land, describing it, situated in Platt county, state of Missouri, and being on what is commonly known as "Leavenworth Island;" that the defendant, George McGonigle, did, on or about March 1, 1883, unlawfully and wrongfully enter upon said premises and dig sand thereon, and remove, take, and carry away to the city of Leavenworth, and convert and appropriate the same to his own use, to-wit, 200,000 bushels, of the value of one cent per bushel, to the damage of the plaintiff in the sum of \$2,000, and prayed judgment for the sum of \$2,000 and costs. To this petition the defendant answered, the answer being a general denial. Upon the issues as thus made the cause came on for trial before the court and a jury; whereupon the defendant objected to the introduction of any testimony, upon the ground that the petition did not state facts sufficient to constitute a cause of action of which the district court had jurisdiction. This objection was overruled by the court, and the trial proceeded, and resulted in a verdict for the plaintiff of one dollar. The defendant moved for a new trial upon the ground of error of law occurring at the trial and duly excepted to, which motion was overruled, and the defendant excepted. Judgment was then rendered in favor of the plaintiff and against the defendant for one dollar and costs, to which judgment the defendant excepted, and now brings the case to this court for review.

Counsel for plaintiff in error (defendant below) states in his brief that the question involved in this case is as follows: "Is this a local or transitory action? Is it trespass *quare clausum fregit* or trespass *de bonis asportatis*?" We think the question may be more properly stated as follows: Do the facts of this case show a cause of action that is transitory or one that is purely local? Or, in other words, do the facts in this case show a cause of action in the nature of tres-

pass *de bonis asportatis*, or trover, on the one side, or trespass *quare clausum fregit*, on the other side? If the facts show a cause of action in the nature of trespass *de bonis asportatis*, or trover, then the action is certainly transitory; but if they show only a cause of action in the nature of trespass *quare clausum fregit*, then the action is admittedly local. The distinction between transitory and local actions, both at common law and under the Code, is generally and substantially as follows: "If the cause of action is one that might have arisen anywhere, then it is transitory; but if it is one that could only have arisen in one place, then it is local. Hence actions for injuries to real estate are generally local, and can be brought only where the real estate is situated, while actions for injuries to persons or to personal property, or relating thereto, are generally transitory, and may be brought in any county where the wrong-doer may be found.

These propositions, we suppose, are conceded. But the real contention between the parties to this action is whether the real and substantial grievance, set forth by the plaintiff as the foundation for his action, is one which related merely to real estate or one which may be considered as fairly relating to personal property. The petition states wrongs relating both to real estate and to personal property. It states that the defendant unlawfully and wrongfully entered upon the plaintiff's premises in Missouri, and dug sand thereon. This, of course, was a wrong relating to real estate only; but the petition also states that after the sand was severed from the real estate the defendant then removed the same to Leavenworth city, Kansas, and there converted and appropriated the same to his own use; and these last-mentioned wrongs certainly related to personal property only, for as soon as the sand was severed from the real estate it became personal property. This principle, of things becoming personal property when severed from the realty, is universally recognized by all courts and by all law writers. Besides, the plaintiff in this case, after alleging the above-mentioned wrongs, then asks for damages only for the wrongful conversion of the sand, which was personal property, and does not ask for damages for injuries done to his real estate. He seems to waive all the wrongs and injuries done with reference to his real estate, and to his possession thereof, provided the digging and the removal of the sand was any injury to either, and sues only for the value of the sand which was converted.

We think it is true, as is claimed by the defendant, that the petition states facts sufficient to constitute a cause of action in the nature of trespass *quare clausum fregit*, but it also states facts sufficient to constitute a cause of action in the nature of trespass *de bonis asportatis*, and of trover; and we think the plaintiff may recover upon either of these latter causes of action, for they are unquestionably transitory, although it must be conceded that he cannot recover upon the former cause of action, for it is admittedly local in its character, and because the plaintiff has brought his action in a jurisdiction for-

eign to the one where this local cause of action arose. But as the plaintiff asks no relief pertaining specially to the local cause of action, but only such as may be given upon the facts of the transitory cause of action, we think he may recover. All the old forms of action are abolished in Kansas. We now have no action of trespass *quare clausum fregit*, nor of trespass *de bonis asportatis*, nor of trover, but only one form of action, called a civil action. Civil Code, § 10. And under such form of action all civil actions must be prosecuted; and all that is necessary in order to state a good cause of action under this form is to state the facts of the case in ordinary and concise language, without repetition. Civil Code, § 87. And when the plaintiff has stated the facts of his case he will be entitled to recover thereon just what such facts will authorize. *Fitzpatrick v. Gebhart*, 7 Kan. 42, 43; *Kunz v. Ward*, 28 Kan. 132. We now look to the substance of things, and not merely to forms and fictions. If the facts stated by the plaintiff would authorize a recovery under any of the old forms of action, he will still be entitled to recover, provided he proves the facts. If the facts stated would authorize one or two or more kinds of relief, he may then elect as to which kind of relief he will obtain; and the prayer of his petition will generally indicate his election. And if one kind of relief is beyond the jurisdiction of the court, and the other within such jurisdiction, the plaintiff may elect to receive that kind of relief which is within the jurisdiction of the court.

We think the plaintiff may maintain his present action as an action in the nature of trespass *de bonis asportatis*, or trover. When the sand was severed from the real estate it became personal property; but the title to the same was not changed or transferred. It still remained in the plaintiff; he still owned the sand, and had the right to follow it and reclaim it, into whatever jurisdiction it might be taken. He could recover it in an action of replevin. *Richardson v. York*, 14 Me. 216; *Harlan v. Harlan*, 15 Pa. St. 507; *Halleck v. Mixer*, 16 Cal. 574. Or he could maintain an action in the nature of trespass *de bonis asportatis* for damages for its unlawful removal. *Wadleigh v. Janvrin*, 41 N. H. 503, 520; *Bulkley v. Dolbeare*, 7 Conn. 232. Or he could maintain an action in the nature of trover for damages for its conversion, if it were in fact converted. *Tyson v. McGuineas*, 25 Wis. 656; *Whidden v. Seelye*, 40 Me. 247, 255, 256; *Riley v. Boston W. P. Co.* 65 Mass. (11 Cush.) 11; *Nelson v. Burt*, 15 Mass. 204; *Forsyth v. Wells*, 41 Pa. St. 291; *Wright v. Guier*, 9 Watts, 172; *Mooers v. Wait*, 3 Wend. 104. Or he could maintain an action in the nature of *assumpsit* for damages for money had and received, if the trespasser sold the property and received money therefor. *Powell v. Rees*, 7 Adol. & E. 426; *Whidden v. Seelye*, 40 Me. 255; *Halleck v. Mixer*, 16 Cal. 574. See, also, in this connection, the case of *Fanson v. Linsley*, 20 Kan. 235. In all cases of wrong the tort, or a portion thereof, may be waived by the party injured, and he may recover on the remaining portion of the tort, or on an implied con-

tract, provided the remaining facts will authorize such a recovery. Mr. Waterman, in his work on trespass, uses the following language:

"Sec. 1102. Although, as standing trees are part of the inheritance, and the severing them from it is deemed an injury to the freehold, for which trespass *quare clausum fregit* is the appropriate remedy, yet the party may waive that ground of recovery, and claim the value of the timber only thus severed and carried away. In the one case the entering and breaking of the close is the gist of the action; in the other, the taking and carrying away of the property. In the latter case the action is transitory and not local." See, also, *Nelson v. Burt*, 15 Mass. 204; *Halleck v. Mixer*, 16 Cal. 574.

The plaintiff in error, defendant below, has cited a large number of authorities, but, under our Code of Practice and Procedure, they hardly apply to the facts of this case. Those nearest applicable are the following: *American Union Tel. Co. v. Middleton*, 80 N. Y. 408; *Frost v. Duncan*, 19 Barb. 560; *Howe v. Willson*, 1 Denio, 181; *Sturgis v. Warren*, 11 Vt. 433; *Baker v. Howell*, 6 Serg. & R. 476; *Powell v. Smith*, 2 Watts 126; *Uttendorffer v. Saegers*, 50 Cal. 496. The case of *Telegraph Co. v. Middleton*, *supra*, was where the defendant committed a trespass by cutting down telegraph poles in a highway and throwing them in the ditches and on the fences on the sides of the highway, and leaving them there. There was no asportation from the premises, no conversion, and no intended asportation or conversion; and the court held that the action was therefore trespass *quare clausum fregit* and not *trover*, and that the action was therefore local in its character and not transitory.

The case of *Frost v. Duncan*, *supra*, was not decided by a court of last resort; and the main question decided was that two causes of action were improperly joined in one count. Besides, in that case the defendants were in the actual possession of the land, claiming the same as their own under a deed. The next four cases were not decided under any reformed code of procedure, and we do not think that the seventh and last case cited conflicts with the views that we have expressed. The fact that the question of title to real estate was incidentally raised in this case makes no difference. See the cases heretofore cited, and especially *Harlan v. Harlan*, 15 Pa. St. 507; *Halleck v. Mixer*, 16 Cal. 574. The plaintiff was in possession, claiming to own the property, while the defendant was a mere wrong-doer, with no claim of interest in the land.

We have so far considered this case as though it made no difference whether the sand was severed from the real estate and carried away by one act only, or by two or more; nor do we think that it can make any difference. Under any circumstances the sand remains the property of the owner of the land until he chooses to abandon the same. We suppose that if the sand were severed from the real estate by one act, and then carried away by another, this proposition would not be questioned, and probably it will not be questioned even if the sand was severed and carried away by a single act; and if the sand remains the property of the owner of the real estate, as we think

it does, there can be no good reason why he should not be entitled to all the remedies for its recovery, or for loss, or damages for its injury or detention or conversion, which he might have with respect to any other personal property.

The judgment of the court below will be affirmed.

(All the justices concurring.)

(33 Kan. 683)

UTLEY v. FEE and others.

Filed July 9, 1885.

1. ACTION TO QUIET TITLE—PRESUMPTION AS TO VALIDITY OF DECREE—TAX TITLE.

In all cases it must be presumed, where nothing appears to the contrary, that the acts of public officers and of courts are valid; and therefore where a decree of the district court of Osage county, Kansas, is rendered, quieting title in favor of a person who holds under a tax deed and against two persons who hold the original patent title, and nothing is shown that would render the decree invalid, *held*, that the decree must be considered as valid. And *further held*, that such decree will vest in the tax-title holder all the titles held by all the parties.

2. SAME—EFFECT OF DECREE.

And in such a case, where the original patent title appears from the records of the county to be still in the original owners, except for such tax deed, and the tax-title holder, who is also the plaintiff in the case, has no knowledge or notice of any other claim of title, and no person is in the possession of the property holding adversely to him, *held*, that the decree quieting the title in his favor will quiet his title as against all persons holding title under the original owners by deeds previously executed but not yet recorded.

3. SAME—CONVEYANCE BY QUITCLAIM DEED.

And although the persons holding title under the original owners by deed previously executed, but not yet recorded, may, after such decree, take the actual, visible, and notorious possession of the property, yet the plaintiff may nevertheless sell the property and convey the same to any person who may choose to purchase, and may convey his entire estate by a quitclaim deed.

Error from Osage county.

A. J. Utley and Ellis Lewis, for plaintiff in error.

D. S. Alford, for defendant in error.

VALENTINE, J. This was an action in the nature of ejectment brought in the district court of Osage county, Kansas, by A. J. Utley against J. H. Fee and W. W. Cockins, to recover certain real estate situated in said county. Utley's title is founded upon a tax deed executed by the county clerk of Osage county to C. L. Flint, a judgment quieting the title to the land in favor of Flint and against H. D. Fisher, the original patentee from the United States, and E. D. Hammond, and a quitclaim deed from Flint to the plaintiff, Utley. Fee's title is founded upon a chain of title from Fisher down to Fee himself, and the actual, visible, and exclusive possession of the property by Fee. Cockins has no interest in the property except as the agent of Fee. As dates and some other matters are of importance, we shall here give them as follows:

August 25, 1869, Fisher conveyed the property to Hammond. May 5, 1874, the property was sold, for the taxes of 1873, to Flint. Feb-

ruary 2, 1875, Hammond conveyed the property to Henry E. Benson. July 20, 1877, the county clerk of Osage county executed a tax deed to Flint, which tax deed was recorded the same day. September 19, 1877, Benson conveyed the property to Mrs. P. A. Griffith. October 28, 1878, the property being vacant and unoccupied, Flint, by an action in the district court of Osage county, Kansas, quieted his title against Fisher and Hammond. May 7, 1880, Mrs. Griffith and her husband executed a quitclaim deed for the property to the defendant Fee. July 26, 1880, Fisher executed a quitclaim deed for the property to Fee, and the deed was recorded on October 26, 1880. March 1, 1881, the defendant Fee, by his agent, Cockins, took possession of the property and inclosed the same with a fence. Prior to that time it had been vacant and unoccupied, and since that time Fee has been in the actual, visible, and exclusive possession thereof, though no one has ever resided upon it. July 17, 1882, Flint executed a quitclaim deed for the property to the plaintiff, Utley, and the deed was recorded an August 12, 1882. August 15, 1882, Utley commenced this action of ejectment against Fee and Cockins, obtaining proper service of summons upon Cockins in Douglas county, Kansas, where he resided; but did not obtain, or attempt to obtain, any service of summons upon Fee except by publication and as a non-resident of the state of Kansas, although Fee at the time, and for several years prior thereto and since, up to the present time, resided in Lawrence, Douglas county, Kansas. The answer-day under the publication notice was fixed for September 28, 1882. No summons was ever issued in the case against Fee. October 26, 1882, the deed from Hammond to Benson was duly recorded. November 15, 1882, the deed from Fisher to Hammond was duly recorded. November 23, 1882, the deed from Benson to Griffith was duly recorded. April 4, 1883, Fee voluntarily appeared in this action and answered to the plaintiff's petition. October 5, 1883, the deed from Mrs. Griffith and husband to Fee was duly recorded.

October 6, 1883, the second and final trial in this case was had before the court without a jury, and the court made special findings of fact and a conclusion of law. November 2, 1883, the plaintiff, Utley, moved for a new trial, which motion was overruled, and judgment was rendered in favor of the defendant and against the plaintiffs for costs. February 11, 1884, the case for the supreme court was duly settled, signed, and authenticated. August 21, 1884, such case, with a petition in error, was filed in the supreme court by Utley, who asks that the judgment of the district court shall be reversed.

None of the evidence introduced on the trial of the case has been brought to this court, but the findings of the court below have; and from them the foregoing facts of the case appear. It also appears from such findings that the tax deed upon which the plaintiff partially relies is at least voidable; but whether it is absolutely void or not, or whether it is void upon its face or not, is not expressly shown by the

record. It also appears from the findings that the deed executed by Fisher to the defendant Fee, on July 26, 1880, was executed "without consideration, and for the purpose of making an apparent chain of title from the United States to Fee;" and this was done for the reason that the prior deeds in the chain of title from Fisher to Fee had "been lost, and the grantors removed from the country into parts unknown." The deed itself, however, contains no reference to any lost or unrecorded deed. With reference to the decree quieting title in favor of Flint, and against Fisher and Hammond, and the action in which such decree was rendered, it is not shown what the issues were, or what the plaintiff alleged in his petition, or what kind of service of summons was made upon the defendants, or whether the defendants made any appearance in the case or not, or whether the decree was rendered upon default or not. It seems, however, to be admitted by the parties that the decree was founded solely upon Flint's tax deed; but what was alleged with regard to the tax deed, or with regard to possession under it or adverse to it, is not shown. The defendants state in their brief that the decree was, in fact, rendered upon service by publication only, and upon default. We, however, must decide the case upon the record brought to us.

We suppose that if the plaintiff had no other title than his tax deed he would not claim title, for, as before stated, the tax deed is at least voidable, and if it were standing alone it might be avoided by any person having any interest in the property. But the plaintiff also claims title upon other grounds—*First*, upon the decree quieting title in favor of Flint and against Fisher and Hammond; and, *second*, upon his purchase of Flint's title without any actual knowledge of Fee's title, or of any of the unrecorded deeds in the chain of title from Fisher to Fee. And he claims title upon these grounds for the following reasons: *First*. Flint quieted his title against Fisher and Hammond, the only persons who at that time had any record title adverse to Flint's title,—and no one, at that time, had any adverse possession,—and Flint thereby obtained all the title and interest which Fisher and Hammond at that time or previously possessed. He claims that under section 21 of the act relating to conveyances all the unrecorded deeds executed by Fisher and Hammond and others were void in law and in equity as to Flint, and as to Flint's assignees, and that the placing of such unrecorded deeds on record afterwards would not render them valid, by relation or otherwise, as to Flint or his assignees. *Second*. He further claims that when he purchased the property Fee's possession of the same was no notice to him of such unrecorded deeds, or of any unrecorded deed, and was no such fact or circumstance as would put him upon inquiry with reference to Fee's unrecorded title or interest; and this, he claims for the reasons—*First*, that when Fee put his deed from Fisher to himself upon record, and left the other deeds unrecorded, it must be presumed that he abandoned every other source of title which he then had; and, *second*,

that by such acts Fee is estopped from asserting any other title or interest as against any person who may have innocently and in good faith acquired rights, interests, or equities in or to the premises, relying upon the records as made by Fee himself. In other words, Utley claims that as Fee put one title upon record all persons not knowing that he had any other title had the right to assume, and to act upon the assumption, that Fee had no other title.

Upon the other side, the defendant Fee claims the reverse of what the plaintiff, Utley, claims. He claims that the decision in this case depends largely, if not entirely, upon the validity or invalidity of the aforesaid tax deed, which, as he claims, is not only void but is also barred as to Fee by a two years' statute of limitations; that the decree quieting title is also void under the decision in the case of *Hart v. Sanson*, 110 U. S. 151, S. C. 3 Sup. Ct. Rep. 586, for the reason that no service or summons was made upon the defendants in the action quieting title except by publication, and no appearance was made in the case; also that the decree quieting title is void for the reason that the plaintiff was not in the possession of the property at that time or at any other time, (*Pierce v. Thompson*, 26 Kan. 714;) that when the plaintiff purchased the property the defendants were in the actual, open, visible, notorious, and exclusive possession, and that Utley was required to take notice of all their rights and interests, and that Utley procured his interest in the property only by a quit-claim deed, and therefore could not be an innocent and *bona fide* purchaser.

For the purposes of this case we shall assume that the tax deed is valid upon its face, for nothing has been shown to the contrary. We shall also assume for the purposes of this case that the decree quieting the title to the property in Flint is valid as against Fisher and Hammond, for nothing appears to the contrary. And in all cases it must be presumed, where nothing appears to the contrary, that the acts of public officers and of courts are valid. There is nothing shown in this case sufficient to bring it within the decision in the case of *Hart v. Sanson*, 110 U. S. 151; S. C. 3 Sup. Ct. Rep. 586; or the decision in the case of *Pierce v. Thompson*, 26 Kan. 714. While it is true that a person who is not in the actual possession of real estate by himself or tenant cannot quiet his title under section 594 of the Civil Code, (*Pierce v. Thompson*, 26 Kan. 714,) yet if he holds the legal title, and the premises are vacant and occupied, he may maintain an action to quiet his title independent of said section. *Douglass v. Nuzum*, 16 Kan. 515. And in this case we must assume that enough was alleged and proved in the case quieting Flint's title against Fisher and Hammond to render the decree valid, whatever may have been the real facts of the case; and, assuming the decree to be valid, then, of course, Flint, when he obtained the decree, obtained all the estate and interest, legal and equitable, which Fisher and Hammond may at that time have had in the property. *Belz v. Bird*, 31 Kan. 139, 143; S. C. 1 Pac. Rep. 246. The two titles were

then merged, and Flint, in addition to his original title, also held Fisher and Hammond's record title, and stood in their place.

But the difficult question now arises, what effect did the decree quieting Flint's title have upon the titles of the several grantees of Fisher and Hammond, who held no evidences of title except unrecorded deeds? We would think that it virtually destroyed their titles, and rendered them ineffectual and void. Indeed, at the time when the decree quieting Flint's title was rendered the unrecorded deeds, held by the grantees of Fisher and Hammond, were void as against Flint without any decree of any kind,—Comp. Laws 1879, c. 22, (relating to conveyances,) § 21,—for such deeds had never been recorded, and there is no claim that Flint had any actual notice of them, or notice of any fact that would have put him upon inquiry, and the holders of the deeds were not in the possession of the property. Many authorities might be cited supporting these propositions, but it is not deemed necessary to cite them. And the deeds being void cannot, in and of themselves, or separate and alone, so operate as to constitute the foundation of any kind of title or estate, legal or equitable. While it is true that unrecorded deeds, with visible, open, notorious, and exclusive possession in the grantee constitute an equitable estate, and constitute such notice as will put subsequent purchasers and others upon inquiry, yet an unrecorded deed, separate and alone, and without any additional fact or circumstance to aid or assist it, constitutes no notice, but is an utter nullity, except as between the parties thereto. The title and estate of a person holding an unrecorded deed is, as to third persons without notice, wholly in the grantor, and the grantee is in privity with its grantor, and any decree rendered against the grantor, affecting the grantor's title, is also in effect a decree rendered against the grantee, and it equally affects his title, and the decree is *res adjudicata* as to the interest of all.

In the present case, when Flint quieted his title against Fisher and Hammond, the only title that could be considered as adverse to Flint's—having reference to our registry laws—was the record title of Fisher and Hammond; and Flint, by his decree quieting his title against Fisher and Hammond, procured this record title from them. Now, if Fisher and Hammond's grantees can ever afterwards procure any title by recording their previously unrecorded deeds, from whom will they obtain it? They cannot procure it from Fisher or Hammond, because Fisher and Hammond's title has already passed to Flint; and we hardly suppose it will be claimed that they can procure it from Flint. Where a deed is recorded a long time after its execution it probably takes effect, as to innocent third persons without notice, at the same time that it would if it were executed and recorded on the day on which it is recorded. *Norton v. Birge*, 35 Conn. 250. See, also, *Cameron v. Marvin*, 26 Kan. 627, 628; *McVay v. English*, 30 Kan. 371. S. C. 1 PAC. REP. 795.

After Flint procured his decree quieting title against Fisher and Hammond, we think that all titles were merged in him. This virtually disposes of this case; for although Fee was in the possession of the property when Utley procured his title, and although Utley procured such title by a quitclaim deed, yet we think he obtained all the title which Flint possessed. It is true that possession with a claim of ownership is evidence of title, (*Gilmore v. Norton*, 10 Kan. 491, 505, 506; *Mooney v. Olsen*, 21 Kan. 691, 697;) and if the possession is actual, visible, exclusive, and notorious, it is sufficient to put all persons upon inquiry. *Lyons v. Bodenhamer*, 7 Kan. 455; *Johnson v. Clark*, 18 Kan. 157; *School-dist. v. Taylor*, 19 Kan. 287; *Greer v. Higgins*, 20 Kan. 420; *Tucker v. Vandermark*, 21 Kan. 263; *McNeil v. Jordan*, 28 Kan. 7. But such possession is only *prima facie* evidence of title, and only of title generally, and is not evidence of any particular title or of any particular kind of title. *Gilmore v. Norton*, 10 Kan. 491. It is merely evidence of some kind of title, or estate, or interest, or equity in the person in the possession of the property, and it is sufficient evidence to put all others upon inquiry. But there are exceptions to this general rule. The rule is never extended so far as to enlarge the estate or interest of the party in possession, or to give him more than he actually owns; or at least this is true until some statute of limitations has completely run in his favor, and given him all the estate that he claims; and where a party is in the possession of real estate, and has two or more titles, each founded upon a separate written instrument, *each capable of being recorded under the registry laws*, and such party has one of his titles recorded, and fails to have the others recorded, and his possession is consistent with his recorded title, there would be some reason for holding that he abandons and loses all the titles which he does not have recorded as against persons who subsequently and in good faith procure rights or interests in or to the property. 2 Pom. Eq. Jur. § 616, and cases there cited. This applies to titles which are capable of being recorded, and not to titles which cannot be recorded. But whether the foregoing proposition is true or not, there is no rule that prevents any person from purchasing a title from the owner out of possession, and a title which the party in possession does not own. There is also much reason for holding that a person who procures a title by virtue of a quitclaim deed cannot be considered as an innocent or *bona fide* purchaser. *Martindale*, Conv. § 56, 285, and cases there cited; *Richards v. Snyder*, (the supreme court of Oregon, February 19, 1885,) 6 PAC. REP. 186. But, as heretofore stated, there is no rule that will prevent a purchaser who takes a quitclaim deed from procuring all the title which his grantor at the time possesses. A quitclaim deed is as much a conveyance as any other kind of deed, and it will convey what the grantor has just as well as any other deed. It is generally held, however, that a quitclaim deed will convey nothing more than what the grantor actually

owns; while a general warranty deed, with all the usual covenants, may sometimes convey to an innocent and *bona fide* purchaser more than the grantor owns, and all in fact that he may seem to own from the records.

We do not think that it is necessary to consider the other points presented by counsel. Flint's tax deed was not barred by any statute of limitations when he quieted his title; and since then Flint and the plaintiff, Utley, hold under Fisher's original patent title as well as under the tax deed; and it really makes no difference whether the tax deed, independent of the decree quieting title, be considered as valid or void, barred or not barred. The decree is valid, and that is sufficient.

The judgment of the court below will be reversed, and cause remanded, with order that judgment be rendered in favor of the plaintiff and against the defendants for the recovery of the land, and for costs.

(All the justices concurring.)

(33 Kan. 692)

KNOWLES and others v. BOARD OF EDUCATION OF THE CITY OF TOPEKA, KANSAS.

Filed July 9, 1885.

CONSTITUTIONAL LAW — CITY BONDS TO ERECT SCHOOL-HOUSE — LAWS KANSAS, 1885, CH. 56.

Chapter 56 of the laws of 1885, authorizing the board of education of the city of Topeka to issue bonds of the school-district for the purpose of purchasing sites for school buildings, erecting new school buildings, etc., in an amount not exceeding \$100,000, upon a majority vote of the electors of the district, does not conflict with section 17 of article 2, nor with section 1 of article 12, of the state constitution, and is therefore not unconstitutional.

Error from Shawnee county.

Action commenced June 2, 1885, in the superior court of Shawnee county by Albert W. Knowles, and others, to restrain and prohibit the board of education of the city of Topeka from issuing certain bonds authorized by an act of the legislature, approved February 21, 1885, entitled "An act to authorize and empower the board of education of the city of Topeka, in Shawnee county, state of Kansas, to issue the bonds of their school-district for the purpose of purchasing sites, erecting buildings, and making additions to present buildings, and furnishing said buildings and additions as school rooms." At the time of the commencement of the action a temporary injunction was granted, and subsequently the defendant filed its answer, and moved to dissolve the temporary injunction. The parties stipulated that the answer, excepting the allegation therein that defendant was authorized to issue its bonds, contained all the facts in the case, and was true. On June 5, 1885, the court dissolved the temporary injunction, and dismissed the petition at the costs of the plaintiffs. The judge hearing the case, WEBB, J., filed the following written opinion:

WEBB, J. This is an action brought in the names of Albert W. Knowles and four other citizens and tax-payers, on their own behalf and on behalf of
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all other property holders and tax-payers of the city of Topeka, as plaintiffs, against the board of education of the city of Topeka, as defendant, to perpetually enjoin the defendant from issuing and negotiating certain proposed bonds of its school-district, said school-district being the city of Topeka. The case was heard on the petition, answer, and certain facts agreed upon, and from these the case may be briefly stated as follows:

The legislature, at its recent session, passed an act "to authorize and empower the board of education of the city of Topeka, in Shawnee county, to issue the bonds of their school-district for the purchasing of sites, erecting buildings, making additions to present buildings, and furnishing said buildings and additions as school-rooms." This act was approved on the twenty-first of February, and stands as chapter 56 of the Laws of 1885. The act authorizes said board of education to issue the bonds of said district "in any sum or sums not exceeding one hundred thousand dollars" for the purposes mentioned, provided that the question of issuing such bonds should be first submitted to the electors of said district, and a majority of said electors voting thereon should vote in favor of issuing the same. At a regular meeting of defendant board, held on the twenty-third of March, said board resolved to submit to the electors of said school-district the question of issuing the bonds of said district in the sum of \$50,000, for the purposes mentioned in the statute, said question to be voted upon at the regular city election to be held upon the seventh of April, due notice thereof being given for 10 days prior to said election. Due notice of such submission was given by the publication of a "Bond Proposition—To the Electors of the City of Topeka," in each of the three daily newspapers published in the city of Topeka,—the *Capital*, the *Commonwealth*, and the *Journal*,—for 10 days prior to said seventh of April, which proposition was sufficient in form and substance, and was signed by the president and clerk of the defendant. It is also shown that at said election there were 1,823 votes cast in favor of the issuance of said bonds, and 940 votes against such issuance, the majority for the bonds being 883.

The defendant, regarding itself as fully authorized, by reason of the premises, to issue the bonds of said district to the amount of \$50,000, was about to do so when this action was commenced. A temporary injunction was granted as prayed for, whereupon the defendant filed its answer and moved to dissolve said temporary injunction. Upon the hearing of said motion the plaintiffs contended that said chapter 56 of the Laws of 1885, purporting to authorize and empower the defendant board to issue the bonds of said school-district for the purposes mentioned, is unconstitutional and void, and this is really the only controverted question in the case. The argument of the plaintiffs is briefly this: The school-district of said city of Topeka, represented by the defendant, the board of education of said city, is a corporation. Chapter 48, Laws 1870, § 1; chapter 100, Laws 1872, § 100; chapter 122, Laws 1876, art. 11, § 4.

Since January, 1881, Topeka has been a city of the first class, and ever since that date there have been three cities of that class,—Atchison, Leavenworth, and Topeka,—all governed by the same general laws, and each constituting a school-district; and each of said school-districts is governed by a board of education provided for by the same general laws applicable to said districts. And it was argued that said chapter 56, Laws 1885, undertakes to confer corporate powers, and as it relates to the city of Topeka alone, and not to all cities of the first class, it is a special act, and as such it is prohibited by the very words of section 1 of article 12 of the constitution, and is therefore void.

It may not be at all important to the decision of the question presented for determination in this case, but it may be well enough to note the fact, that when the acts above cited—chapter 48, Laws 1870, chapter 100, Laws 1872, and chapter 122, Laws 1876—were passed, Topeka was a city of the second

class; and it may be well to call attention to the peculiar phraseology of said acts:

Act of 1870, c. 48, § 1: "Every *school-district* [of cities of second class] organized in pursuance of this act shall be a body corporate, and shall possess the usual powers of a corporation for public purposes, by the name and style of school-district No. _____ of the county of _____," etc.

Act of 1872, c. 100, § 100: "The *public schools* of each city organized in pursuance of this act shall be a body corporate, and shall possess the usual powers of a corporation for public purposes, by the name and style of *The Board of Education of the City of _____*," etc.

Section 4 of article 11 of chapter 122, Laws 1878, is merely a re-enactment of section 100 of the act of 1872, just quoted,—said chapter 122 being a revision and consolidation into one act of all the school laws of the state.

Topeka remained a city of the second class until January, 1881, when it became a city of the first class. Article 10 of chapter 122, Laws 1876, above referred to, relates to "public schools in cities of the first class." Its provisions as to the powers and duties of the board of education are very similar to those contained in article 11 relating to "public schools in cities of the second class." But there is no provision in said article 10 declaring that "the public schools" or the "school-district" of cities of the *first class* shall be *bodies corporate*. Nor has the writer of this opinion been able to find any such provision in any act or statute, although the powers conferred by said article 10 are those usually conferred upon incorporated school-districts, and the government of the public schools in incorporated cities has been in the hands of "boards of education" since 1867. There has been no legislation respecting boards of education of cities of the first class since Topeka became a city of that class. But it will hardly be contended that the corporate powers lawfully conferred upon the board of education of the city of Topeka when said city was a city of the *second class* have been lost or destroyed by reason of the transition of the city from a city of such class to a city of the first class. It will therefore be considered, for the purposes of this case, that the public schools of the city of Topeka are "a body corporate under the name and style of the board of education," and that therefore said chapter 56 of the Laws 1885 is not void for want of a proper body corporate to which it can apply.

Upon the argument to dissolve the temporary injunction some additional facts were stated and conceded, which it may be well to notice. Prior to 1857 the territory now embraced in the city of Topeka, together with other territory since included in other districts, constituted a school-district, duly organized and incorporated under the general school laws as "School-district No. 23, of the County of Shawnee," (Comp. Laws 1862, c. 181, § 24; Gen. St. 1868, c. 92, § 24; Laws 1876, c. 122, art. 3, § 2;) that said city school-district is still known as "School-district No. 23;" that the clerk of the board of education makes his annual reports to the county superintendent as "Clerk of Topeka School-district No. 23;" and that the county superintendent of public instruction, in making his semi-annual distribution of the state and county school funds, treats said city school-district as "District No. 23," and issues his orders or warrants on the county treasurer for the school moneys due upon such distribution to public schools of the city. It would seem, therefore, that notwithstanding the fact of the actual or supposed incorporation *anew* of the public schools of cities, and that by such reincorporation they are governed somewhat differently from school-districts organized under the general school laws of the state, they are still *simply school-districts*, and in no sense corporations of a higher grade than school-districts generally throughout the state. Indeed, it could not be otherwise, as each city of the first class (and each city of the second class also) is a municipal corporation in the highest sense of the term, and an incorporated school-district occupying or embracing the same territory must of necessity be inferior to the powers and jurisdiction of the

city itself, and therefore, at best, can be a *quasi* corporation only, its relative position towards the city being no better than that of the ordinary school-district toward the county in which it is situated, even if so good.

The principal question remains: Is said chapter 56 a "special act conferring corporate powers," within the meaning and intent of section 1 of article 12 of the constitution? If the views already expressed respecting the proper *status* of a city school-district are correct, it would seem that the question has long been settled by undoubted authority. Section 1 of article 12 of the constitution is as follows:

"Section 1. The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws, but all such laws may be amended or repealed."

If it were an open question the writer hereof would be of the opinion that said section had reference only to private corporations; that no portion of said article 12, except the fifth section, could be fairly construed as having reference to municipal corporations. But a contrary construction was given by the supreme court in 1866 in the case of the *City of Atchison v. Bartholow*, 4 Kan. 124, 144, where it was held that, while the whole article is merely restrictive of the general legislative power conferred upon the legislature by section 1 of article 2, yet that it applied as well to laws creating and governing municipal corporations as to statutes creating private corporations. General laws have been upon the statute-book for the organization of counties, for the organization of incorporated cities, for the incorporation and organization of school-districts, and for the creation of private corporations, for 20 years or more. It is a popular idea—and there are some reasons and decisions for such opinion, (Bouv. Law Dict. tit. "Municipal Corporation")—that a *county* is a "municipal corporation;" and in like manner municipal townships, so called, are frequently spoken of as municipal corporations. But this does not appear to be correct. Judge DILLON in his excellent treatise on the Law of Municipal Corporations, third edition, speaks of political, public, and civil, as well as private corporations. He says:

"All corporations intended as agencies in the administration of civil government are *public*, as distinguished from *private* corporations. Thus, an incorporated school-district or county, as well as city, is a public corporation, but the school-district or county, properly speaking, is not, while the city is, a *municipal* corporation." Section 22.

But the *status* of an incorporated school-district, under the laws of this state, has been definitely settled by our own supreme court. In the case of *Beach v. Leahy*, 11 Kan. 23, 31, decided in 1873, the court says:

"The mere fact that these organizations are declared in the statute to be bodies corporate has little weight. We look behind the name to the thing named. Its character, its relations, and its functions determine its position, and not the mere title under which it passes. * * * The conclusions to which these investigations have led us are that among public corporations *only corporations proper* are included within the scope of article 12 of the state constitution, and that a *school-district* is only a *quasi* corporation, and not covered by its provisions."

In 1871 the legislature passed an act "authorizing school-district No. 2, Neosho county, to issue bonds to build a school-house." The district board issued the bonds authorized by said act, and, when the taxes were levied to pay the interest on bonds, Beach and others sought by injunction to prevent the collection of said taxes, on the ground that said bonds were void. The act referred to was claimed to be unconstitutional upon the same grounds now urged against the validity of chapter 56 of the Laws of 1885. The case of *Beach v. Leahy* was brought to test its validity, and the supreme court held that the act was valid. This decision would seem to be sufficient authority alone upon which to rest a decision in the case at bar.

But there are numerous other decisions of the same court which go to show that "municipal corporations" proper are incorporated cities, towns, and villages, and that counties and municipal townships, though public corporations, are not within the reach of section 1 of article 12 of the constitution. Thus, "the provisions of article 12 of the constitution have no application to counties as counties." *State v. Com'rs Pawnee Co.* 12 Kan. 439.

"Section 5 (of article 12) refers to municipal corporations proper, *cities, towns, and villages*, and the manifest scope of the article is limited to private corporations and municipal corporations proper. *Com'rs Pottawatomie Co. v. Sullivan*, 17 Kan. 61.

"Counsel fail to note the distinction between municipal corporations proper and *quasi* corporations. This distinction is pointed out and commented on in *Beach v. Leahy*, 11 Kan. 23. Cities, towns, and villages are municipal corporations proper, while counties, towns, school-districts, and road-districts are *quasi* corporations. The difference between these two classes of corporations is well established, and a principle applicable to the one class is not necessarily applicable to the other." *Eikenberry v. Township of Bazaar*, 22 Kan. 561.

In the case of *Com'rs Norton Co. v. Shoemaker*, 27 Kan. 79, the validity of a special act fixing the compensation of the county clerk and county treasurer of Norton county was sustained. In the course of the opinion Chief Justice HORTON says:

"The legislature, under the constitution, has discretion to determine the necessity for such special laws, and such statute is analogous to those conferring authority by special acts upon counties, townships, and school-districts to issue bonds."

The cases of *Francis v. Atchison, T. & S. F. R. Co.*, 19 Kan. 303, *Com'rs Marion Co. v. Riggs*, 24 Kan. 255, and *Gray v. Crockett*, 30 Kan. 138-142; S. C. 1 Pac. Rep. 50, may be read with profit, as throwing some light upon the general question of the validity of special legislation. The conclusion seems irresistible that a special act giving authority to a particular county, township, or school-district, by name or number, to issue its bonds for any proper purpose, or to do any other necessary or proper act, is not a "special act conferring corporate powers" coming within the reach or scope of section 1 of article 12 of the constitution. And as said chapter 56 of the Laws of 1885 does not relate to a municipal corporation proper, but only to the board of education of a particular school-district, and limits the powers of such board to the issuance of the bonds of said district for proper and necessary purposes, said act is constitutional and valid. The temporary injunction will be dissolved, and the defendant will have judgment against the plaintiffs for costs.

The plaintiffs excepted to the ruling and judgment of the court, and bring the case here.

H. C. Safford, for plaintiffs in error.

Waters & Chase, for defendant in error.

HORTON, C. J. The only question presented in this case, upon the record before us, is as to the constitutionality of an act of the legislature of this state, approved February 21, 1885, authorizing the board of education of the city of Topeka to issue bonds of the school-district for the purpose of purchasing sites for school buildings, erecting new school buildings, etc., in an amount not exceeding \$100,000, upon a majority vote of the electors of the district. The plaintiffs contend that the act is a special law, and therefore in conflict with section 17 of article 2 of the constitution of the state, and that the

act confers corporate powers, and thereby is also in conflict with section 1 of article 12 of the constitution. The first objection to the act must be disposed of favorably to its constitutionality, upon the authority of *State v. Hitchcock*, 1 Kan. 178, and *Com'rs Norton Co. v. Shoemaker*, 27 Kan. 77. It was decided in *State v. Hitchcock*, *supra*, "that the legislature must determine whether its purpose can or can not be expediently accomplished by a general law, and the mere fact that certain results could be accomplished by a general law does not necessarily avoid a special law passed to effect them."

In *Com'rs Norton Co. v. Shoemaker*, *supra*, the writer of this stated in the opinion, among other things, that "the legislature, under the constitution, has discretion to determine the necessity for such special laws, and such statute is analogous to those conferring authority by special acts upon counties, townships, and school-districts to issue bonds." See, also, *Beach v. Leahy*, 11 Kan. 23; *Harvey v. Com'rs Rush Co.* 32 Kan. 159; S. C. 4 PAC. REP. 153. The other objection involves a more difficult question; but, upon careful consideration, we think the decision in *Beach v. Leahy*, *supra*, and the reasoning of the court therein, decisive of the case in favor of the affirmance of the judgment of the court below.

In commenting upon article 12 of the constitution, Mr. Justice BREWER, speaking for the court in that case, said, with reference to counties, townships, and school-districts, that "they are called in the statute 'bodies corporate,' yet they are denominated in the books and known to the law as *quasi* corporations, rather than as corporations proper. They possess some corporate functions and attributes, but they are primarily political subdivisions,—agencies in the administration of civil government,—and their corporate functions are granted to enable them more readily to perform their public duties. * * * Giving corporate capacity to certain agencies in the administration of civil government is not the creation of such an organization as was sought to be protected by article 12 of the constitution. This distinction between *quasi* corporations and corporations proper is no new thing, nor of recent recognition. * * * The conclusion to which these investigations have led us is that among public corporations only corporations proper are included within the scope of article 12 of the state constitution, and that a school-district is only a *quasi* corporation, and not covered by its provisions."

The board of education of the city of Topeka, of course, is not a private corporation, nor is it a corporation created with political and legislative powers like cities and towns for the local civil government and police regulations of the inhabitants of the particular district included in the boundaries of the corporation. The fact that its limits or boundaries are the same as that of the city of Topeka, makes no difference in that particular. It is just the same as if it constituted any other territorial district, described as the board of education of said district. The board of education has power to select its own of-

ficers, to make its rules and regulations, to establish a high school, whenever, in its opinion, the educational interests of the city demand the same, and to exercise sole control over the public schools and school property of the city. The title of all property held for the use or benefit of the public schools, within the territory over which the board of education has jurisdiction, is vested in the board. The board is required annually to make an estimate of the amount of funds necessary and requisite for the support and maintenance of the public schools under its charge, and also of the amount necessary to pay the interest on the bonds issued by the board accruing during the year, and the amount of sinking fund necessary to be collected during such year for the payment and redemption of the bonds; and shall cause to be certified by the president and clerk of the board to the county clerk of the county in which the city is situated the percentage by them levied on the real and personal property of and within the city, as returned on the assessment roll of the county. The board may also issue bonds and negotiate the same for school buildings, etc., upon conditions prescribed by the statute. In brief, the corporate functions of the board of education of a city of the first class are granted by the state to assist in carrying out the general common school system adopted by the state. Article 10, c. 122, Laws 1876; sections 1, 2, c. 149, Laws 1881; section 1, c. 100, Laws 1885.

In our opinion, the board of education of the city of Topeka is a distinct corporation from the municipal corporation of the city of Topeka. We think it is a *quasi* corporation only, and is not a corporation proper, as embraced within the scope of article 12 of the state constitution. *Heller v. Stremmel*, 52 Mo. 309; *Wright v. Stockman*, 59 Ind. 65. For a fuller statement and a further discussion of the case, we refer to the opinion of the learned trial judge, in whose conclusion as to the constitutionality of chapter 56 we concur. 1 Kan. Law J. 346.

The order and judgment of the superior court will be affirmed.
(All the justices concurring.)

(33 Kan. 752)

PARSONS WATER CO. v. KNAPP.

Filed July 9, 1885.

1. EMINENT DOMAIN—CONTESTING CONDEMNATION—JUDGMENT.

Where condemnation proceedings are instituted by a party desiring to obtain an easement in land, and the other party contests only with regard to the amount of the damages which may be awarded, and not with regard to the validity or regularity of the proceedings, and judgment is finally rendered between the parties, awarding damages and costs to the land-owner, *held*, that the party instituting the proceedings cannot claim that such judgment is void because the proceedings are not authorized by statute; but, *held*, that such judgment is valid, whether the proceedings are fully authorized by statute or not.

2. SAME—CONTINUANCE REFUSED.

Where a case is properly on the trial docket for a special term of the court, and is continued at that term by consent of the parties to the next regular term, which commences within eight days after the continuance, and on the ninth day of the regular term, the seventeenth day after the continuance, the case is regularly called for trial, and the defendant asks for another continuance upon the ground that no trial docket had been made out for that term, and for the further reason that the defendant could not safely proceed to trial for the want of material evidence which he has been unable to procure, but no diligence is shown in attempting to procure evidence or in preparing for trial, and the court overrules the application for the continuance, *held* not error.

3. SAME—RIGHT TO FLOOD LAND—MISTRIAL.

Where a corporation commences condemnation proceedings to procure the right, among other things, to flood lands, and does not ask for the entire use of the water to the exclusion of the owner of the land, and the case is tried, over the objections of the party instituting the proceedings, upon the theory that such party would obtain the right to the exclusive use of the water, and would entirely exclude the owner of the land from its use; *held* error, and that, under the circumstances of this case, the error is material.

4. SAME—DAMAGES—EXAMINATION OF WITNESS.

In a case where the principal question is with reference to the amount of damages to be awarded to one of the parties, a witness cannot be asked "the amount of damages sustained."

5. SAME—ST. LOUIS, L. & D. R. CO. v. WILDER, FOLLOWED.

The case of the *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kan. 239, 247, with reference to the judgment to be rendered in condemnation proceedings, referred to and followed.

Error from Labette county.

Kimball & Osgood, for plaintiff in error.

Perkins, Morrison & Bowman, for defendant in error.

VALENTINE, J. The Parsons Water Company is a corporation, organized under the laws of Kansas, "for the purpose of supplying water to the public in or near to the city of Parsons, and to that end to build and maintain a dam, canal, and reservoirs, and to build, maintain, and operate a system of water-works for supplying with water the streets, alleys, lanes, squares, and public places of the said city of Parsons, and for supplying water for extinguishing fires, and for domestic, manufacturing, hydraulic, irrigating, and industrial purposes in said city and country adjacent thereto, and to erect, build, and maintain all buildings, machinery, and apparatus necessary in order to accomplish the purpose above named." The city contracted with the company for a supply of water for fire purposes, and granted to

it the right to construct, maintain, and operate its water-works in said city, and to lay its mains in the streets thereof, and to obtain an adequate supply of water for the purposes for which it was organized. The company desired to construct a dam across a stream known as the "Big Labette Creek," and to overflow certain lands above this dam; and for the purpose of procuring the right to do these things the company instituted condemnation proceedings under article 9 of the act relating to private corporations, Comp. Laws 1879, c. 23. In these proceedings an award of damages of \$330 was made by the commissioners to Caroline M. Knapp, who owned a farm through which the stream ran. She appealed from this award to the district court, where another award was made to her for the sum of \$1,000, and judgment was rendered in her favor for costs; and to reverse this award and judgment the case is now brought to this court.

The first assignment of error is that the district court erred in entertaining the condemnation proceedings, for the reason that a water company, organized for the purposes for which this company was organized, has no power under the statute to obtain any easement or any right or interest in real estate by virtue of condemnation proceedings. We do not think that it is necessary to decide this question, for the water company itself instituted the proceedings to obtain such right, and Mrs. Knapp did not contest its right or power to do so, but consented thereto, and merely contested as to the amount of the damages which might be awarded to her. The company asked for the right, she consented, and the entire contest was with reference to the amount of damages which she should receive. No question as to the company's right to institute and carry on the proceedings, or to obtain what it asked for, was raised in the district court, and therefore, whatever might have been the result if the question had been raised by either party in that court, we think it must now follow that the water company will get what it asked for, if the award and judgment of the district court shall finally be affirmed, and if the company complies with such award and judgment. In support of this proposition, see *Central Branch U. P. R. Co. v. Andrews*, 26 Kan. 702, 710, 711.

The next alleged error is the refusal of the district court to grant a continuance. It appears that the case was taken to the district court in proper time to be tried at a special term thereof. It was regularly on the trial-docket, and was regularly and properly called for trial, when, on November 4, 1883, the parties, by consent, continued the case to the next regular term of the court, commencing on November 12, 1883. No trial-docket was made out for that term; but if there had been, it would not have contained this case, for it would have been made out before this case was continued. Civil Code, § 313. On November 20, 1883, the case was regularly called for trial, except that no trial-docket had been made out as aforesaid. The water company then asked for another continuance, for the reason that no trial-docket had been made out for that term, and for the

further reason that the company could not safely proceed to trial for the want of material evidence which it had been unable to procure. But no diligence was shown in attempting to procure evidence, or in preparing for trial, and the court overruled the application for the continuance.

We cannot say that the court committed material error in this ruling. The granting and refusing of continuances rests, to some extent, within the sound judicial discretion of the trial court. The trial court can know more of the circumstances surrounding the case than it is possible for the supreme court to know, and hence, unless error is clearly shown in the refusal of the court to grant a continuance, the supreme court will not reverse therefor. The trial court, exercising a sound judicial discretion, might, perhaps, very properly, have delayed the case for a time, on account of the sickness in the family of the president of the water company, and for other reasons, but we cannot say that it materially erred in refusing to do so.

The next claim of error is that the court below tried the case upon an erroneous theory, which resulted in a large increase in the amount of the damages awarded to Mrs. Knapp; and it is claimed that this error is shown by the evidence that the court permitted the plaintiff, Mrs. Knapp, to introduce, over the objections and exceptions of the water company; by an instruction of the court to the jury, excepted to by the water company; by the refusal of the court to give certain instructions asked by the water company; by a special finding of the jury awarding to the plaintiff \$385.31 damages, because, as was supposed, the water company obtained the right to the exclusive use of the water, and Mrs. Knapp was excluded from its use; and by the refusal of the court to reduce the aggregate amount of the damages awarded to Mrs. Knapp by striking out said \$385.31.

We are inclined to think that the court below did err in this particular. It seemed to have tried the case upon the theory that the water company procured the right to the exclusive use of the stream—the Big Labette creek—to the total and entire exclusion of the plaintiff, Mrs. Knapp. Now the water company did not ask for such an exclusive right, and we do not think that, under the statutes, or its petition in the condemnation proceedings, it could obtain any such exclusive right, and it should not be required to pay for more than it received. After the final termination of these condemnation proceedings, we think, the water company will have the right to take just so much water as it asked to take, or to do just what it asked to do, when it instituted the proceedings, and no more; and the plaintiff will still have the right to all reasonable and proper use of the water in connection with her farm. Except with the consent of the plaintiff, the water company can interfere with her rights or interests only to subserve some paramount public interest or purpose, and only as far as such public interest or purpose requires or authorizes. With her consent, however, the company may procure greater interests in her

property. As the court below tried the case upon an erroneous theory, we think its award and judgment must be reversed, unless the plaintiff consent to diminish the award by deducting therefrom the sum of \$385.31.

It is also claimed that the court below erred in permitting a question to be asked a certain witness with reference to "the amount of damages sustained" by Mrs. Knapp. We think the court below erred in permitting the question to be asked; but taking into consideration the answer given and the many other questions asked this witness, and the answers given thereto, we think the error was wholly immaterial. The answer to the question was in substance that the value of the property was diminished one-half.

The next ruling of the court below, complained of, is the correction of the judgment which had previously been rendered. We perceive no error in this. The judgment was corrected so as to make it correspond with the decision rendered by this court in the case of *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kan. 239, 247.

If the plaintiff, Mrs. Knapp, consents to the reducing of the award by deducting \$385.31 therefrom, the award and judgment as thus modified will be affirmed; otherwise they will be reversed.

(All the justices concurring.)

(33 Kan. 757)

ATCHISON, T. & S. F. R. Co. v. BROWN, Adm'r, etc.

Filed July 9, 1885.

VERDICT—FINDINGS—EVIDENCE.

Where important and material special findings of the jury are without any support in the evidence, and where other findings are contrary to the evidence, and still other findings evasive and inconsistent, and it appears from such findings that the jury either misconceived the import of portions of the testimony or else did not make fair and impartial answers to the questions of fact submitted, the general verdict cannot stand, although it has been approved by the trial court.

Error from Lyon county.

A. A. Hurd and *C. N. Sterry*, for plaintiff in error.

Scott & Lynn, for defendant in error.

HORTON, C. J. This was an action brought by Joseph Brown, as administrator, to recover damages for the benefit of William Haas, deceased, who is alleged to have lost his life on November 17, 1879, by reason of the negligence of the railroad company, while the said William Haas was in the performance of his duties as an employe of the company. On the day named, Haas was a yard switchman in the employ of the company at its car-yard near the city of Emporia, in this state. He went in between a box car and a flat car upon the railroad, and attempted to make a coupling of the cars. His head was caught between projecting timbers on the flat car and the box car, and so crushed that he immediately died. This is the fourth time the case has been in this court. *Railroad Co. v. Brown*, 26 Kan.

445; *Brown v. Railroad Co.* 29 Kan. 186; *Brown v. Railroad Co.* 31 Kan. 1; S. C. 1 PAC. REP. 605. At the last time the case was tried the jury returned a verdict against the railroad company for \$5,000. The railroad company, after the jury returned its verdict and special findings, moved the court for judgment upon the special findings, notwithstanding the general verdict. This motion was overruled and excepted to.

This is the first error complained of. When the case was here at our July term, for 1883, Mr. Justice VALENTINE, in delivering the opinion of the court, referred to the admitted facts in the case, and the facts claimed to have been established by the parties to the litigation; thereon he commented at length, and declared the law applicable to the case. 31 Kan. 9-17; S. C. 1 PAC. REP. 605. It is said, on the part of the railroad company, that the theory of plaintiff's case has always been "the having of an uncovered ditch in the railroad company's yard, into which Haas stepped while performing his duty, and of which he had no knowledge or opportunity of knowledge." The claim is now made that the findings of the jury show that this theory has no foundation whatever, and cannot be asserted to sustain the general verdict. The findings which the company allege show that Haas did not step into the ditch are the following:

"*Question.* Was the step which Haas took, which brought him onto the track between the two cars, a step into any ditch? *Answer.* Not directly. *Q.* After Haas stepped in between the cars, did he take any step or steps towards the coming box car, and if so, how many? *A.* Not any. *Q.* After Haas stepped in between the two cars, did he take any steps towards the flat car, and if so, how many? *A.* Not any "

We do not think the conclusion contended for by counsel upon these findings is a correct one. We think, from the general verdict, and the evidence introduced in the case on the part of plaintiff below, it may be fairly assumed that when Haas stooped or crouched under the timbers projecting from the flat car to make the coupling, he went down into the ditch immediately under the end of one of the cars. When the jury answered "not directly," they did not expressly negative his stepping or slipping into the ditch. The answer, on the other hand, tends to show that while he did not directly step into the ditch, *he did so indirectly*; that is, that he stepped upon a tie and slipped into the ditch, or stepped upon the surface ground between the ties and slipped into the ditch. That this interpretation should be given to the above findings is evident from the following additional findings of the jury:

"*Question.* If there was any ditch which had anything to do with the accident which resulted in the death of Haas, was such ditch in any way concealed from the view of Haas at the time he walked down to the east end of the flat car and stopped there, waiting for the box car, if he had looked in the direction of it? If the jury answer the last question in the affirmative, they may state fully in what manner, or by what object or objects, or obstruction, if any, such ditch was concealed so that Haas could not have seen it if he had

looked in the direction of it at any time when he was walking down to the end of the flat car, or when he was standing at or by the end of it? *Answer.* There were several ditches there, as the evidence shows; but from the fact that the track being new, it made between every tie look alike, and a place that had been two or three inches deeper could not be easily discovered without careful examination."

The findings, when read together, will fairly bear the interpretation given, and it is the rule that where the findings of a jury are fairly susceptible of two interpretations, that one should be given which supports the general verdict, rather than an interpretation which would overthrow and destroy it. *Railway Co. v. Ritz*, 33 Kan. —; S. C. 6 PAC. REP. 533. We perceive no error in the refusal of the court to enter judgment upon the special findings in favor of the railroad company.

It is the further contention that some of the findings of the jury are without any support in the evidence; that others are contrary to the evidence; and that still others are evasive and inconsistent. After a careful reading of the record, we think that this attack upon the special findings must be sustained. Our examination satisfies us that the jury were more anxious to answer the special findings in such a way as might not interfere with the general verdict, than to give full, fair, and truthful answers to the particular questions of fact submitted. Under such circumstances, the general verdict cannot stand, although it has been approved by the trial court. *Babcock v. Dieter*, 30 Kan. 172; S. C. 2 PAC. REP. 504; *Railway Co. v. Fray*, 31 Kan. 739; S. C. 3 PAC. REP. 550; *Railroad Co. v. Harvey*, 31 Kan. 750; S. C. 3 PAC. REP. 568; *Railway Co. v. Shannon*, 6 PAC. REP. 565; *Railroad Co. v. Weber*, Id. 877; *Railroad Co. v. Keeler*, 4 PAC. REP. 143; *Railroad Co. v. Wagner*, 33 Kan. —; S. C. 7 PAC. REP. 204.

A few illustrations of the unsatisfactory answers given by the jury will suffice:

"*Question.* How much a year would William Haas have contributed to his mother's support if he had lived until she died? *Answer.* On an average, \$527. *Q.* The jury may state the facts upon which they base their answer to the last question. *A.* On the supposition that he would earn on an average \$2.25 per day."

For four years immediately preceding the death of Haas he contributed to his mother only \$209.20; at the rate of \$52.30 per year. At the time of his death he was earning as wages \$1.90 per day; not \$2.25 per day. Even if the deceased could have earned \$2.25 per day, it is extravagant to say, considering all the evidence in the case, that of his yearly earnings he would have contributed \$527 to his mother, who had considerable property of her own, leaving him less than \$200 per year with which to support himself. "The enigma of the future of a life is not to be solved by the mere matter of faith and hope, or even by the natural possibilities of accomplishment; but mainly and chiefly by the experiences of the past, and of what the life has already been. The law runs little along the lines of sym-

thy and affection, but rather along the lines of the actual and the probable." *Railroad Co. v. Brown*, 26 Kan. 443.

"*Question.* Did not William Haas voluntarily work in the new yard? *Answer.* We don't know."

The evidence established that prior to the employment of the deceased in the car-yards, he was at work for the company as a brakeman at \$1.50 per day; that he left that work to accept employment in the old yard of the company at \$1.90 per day; and that he had been at work in the new car-yard about eight days prior to his death. It also appears from the findings of the jury that he knew the yard in which he met his death was a new and incomplete yard, continuously undergoing change in the course of its completion; that he knew, at the time of his death, the ground in the yard where he received his injury was wet and muddy, and that the ties upon which the rails were laid on the track were above the surface of the ground. No objection or protest or complaint upon his part against working in the new yard appears anywhere in the record. Under these circumstances, it is hardly reasonable to say that the deceased did not voluntarily work in the new yard.

"*Question.* Prior to the death of Haas, during the time he was at work in the new yard, was it not of frequent occurrence for cars loaded with projecting material to be in that yard? *Answer.* No evidence that it was. *Q.* Had not William Haas, prior to the time of his death, coupled and uncoupled cars upon the track upon which he met his death? *A.* No evidence that he did."

Upon these matters there is, among other, the following evidence in the record:

Frank J. O'Bourke testified: "That he was the yard-master of the Atchison, Topeka & Santa Fe Railroad Company, at Emporia, at the time that Haas was killed, and knew him as a switchman in the yard of the company; that Haas' duty consisted in catching cars, uncoupling cars, and coupling the same; that the persons working in the yard, constituting the entire day force, were himself, one Stafford, John P. Cherry, and Haas, the deceased; that usually the crew had an understanding between themselves that one man, whom they called foreman, pulled the pins; that Stafford did this; that Cherry rode the cars and Haas coupled; that the south track, upon which Haas was injured, was used at the time for making up the Eureka train once a day; that the Eureka train came in from Eureka in the morning about 10 o'clock, and left in the afternoon about 4 o'clock; that he judged coupling and switching had to be done upon this track at least once a day, during the time that Haas was working there; that, as he remembered, the Eureka train had to be made up every day on that track, and that Haas was engaged in coupling cars upon the track while working in the yard, and in making up the Eureka train; that he did not call to memory any special car, or any special day that cars loaded with projecting material passed through, but that they had cars of that kind at all times liable to come through any day, or not to come through for a month; that it was a common thing to receive cars loaded with projecting material; that they were handled the same as other cars were handled,—that is, they were uncoupled and coupled, stopped and started, and switched."

S. P. Chase testified: "That since October 5, 1883, he has been in the music business; that prior to that time he was the foreman and car-repairer for the

Atchison, Topeka & Santa Fe Railroad Company at Emporia; that he remembered when the company moved into the new yard at Emporia, in the fall of 1879; that the south track, upon which Haas was killed, had been used after the company went into the new yard to make up the Eureka train on; that it was not unusual to receive cars in the yard at that time loaded with projecting material."

H. B. Morse testified: "That he knew William Haas in his life-time, and that he employed him to work in the yard of the Atchison, Topeka & Santa Fe Railroad Company at Emporia; that at the time the railroad company was building the Eureka branch, the Kansas City & Southern branch, and the McPherson branch; that after the company first moved into the new yard, and up to the time of Haas' death, it was not unusual to receive cars loaded with projecting material in the yard."

William Peck testified: "That he could not remember the exact date that the company moved into the new yard, but could recollect something near it; that at the time it was not an unusual thing to see cars with projecting material, and that it is not an unusual thing to see flat cars loaded with projecting material on any road; that he hauled in his train cars loaded with projecting timbers into the new yard prior to November 17, 1879, and that he hauled them out with his train; that such cars were going out on the works west, where the company was constructing a new track,—the McPherson branch,—and were generally A., T. & S. F. railroad cars."

C. M. Hatfield testified: "That he noticed Haas going over to the south track where the cars were to be coupled; that he was at the place where he was killed in about five minutes after he fell; that it was the usual thing to see cars loaded in the yard with projecting material, prior to that time."

Orrin Smith testified: "That in 1879 he was firing a switch-engine in the yard of the Atchison, Topeka & Santa Fe Railroad Company at Emporia; that at the time Haas was killed, he was on an engine used in the new yard of the company; that he was in the new yard about four or five days before Haas' death; that the south track, upon which Haas was killed, was used to make up the Eureka train; that he thought the Eureka train was made up every day on that track during the time he worked there, previous to Haas' death, for three or four days, but that he could not positively swear to that number of days, but could swear that the Eureka train was made up on the track the last two days,—the day Haas was killed and the day before; that the Eureka train was a mixed train,—that is, it was made up of freight and passenger cars; that when the Eureka train came in, the cars that went west were switched out, and the baggage car and passenger car were thrown in on the south track."

On cross-examination the witness testified as follows:

"*Question.* Have you any recollection of the Eureka train having been made up in the south yard prior to Haas' death at any time? *Answer.* I think it was made up, all the time that I was in the yard, right there on that track. *Q.* Didn't you swear at the trial next prior to the last one that you had no recollection of that train having been made up on that track except on the night before Haas was killed,—the evening before Haas was killed? *A.* I shouldn't wonder if I did; that is what I say now. *Q.* Then the only time you have any recollection of that train being made up on that track before Haas was killed was the evening before that, was it not? *A.* It is; if I swore to it before, it is so."

If the jury had said that there was evidence upon these matters before them, but that the evidence was not worthy of belief, or that the witnesses were mistaken, we could at least say that they made

intelligent answers; but the answers they did make are evasive. Again, the following are among several of the inconsistent findings:

"*Question.* Did not Haas know that the standing car, with projecting material, was loaded with materials which projected over the east end of it, when he attempted to make the coupling? *Answer.* Don't know. *Q.* Did not William Haas stoop or bend his body to avoid the projecting timbers at the time he attempted to couple the cars, at the time of his death? *A.* Yes."

It is true that there was a mass of questions presented,—110,—and if we could conclude from the answers that the jury gave intelligent and impartial attention to the testimony and questions submitted, we would not hesitate to overrule the challenges to the answers; but as so many important and material questions have been improperly, evasively, and unsatisfactorily answered, we think it appears therefrom that the jury either misconceived the import of portions of the testimony, or else did not make fair and impartial answers to the questions, and therefore that there has been a mistrial in the case, or a failure of justice. As to the practice controlling the submission of particular questions of fact to a jury, and the construction to be given to the answers thereto, when considered in connection with the general verdict of the jury, we refer to the cases already cited, and also to the following: *First Nat. Bank v. Peck*, 8 Kan. 660; *Wyandotte v. White*, 13 Kan. 191; *Railway Co. v. Holley*, 30 Kan. 465; S. C. 1 PAC. REP. 130.

The judgment of the district court will be reversed, and the cause remanded for a new trial.

(All the justices concurring.)

SUPREME COURT OF KANSAS.

(34 Kan. 27)

TOOTLE and others v. SMITH.

Filed July 9, 1885.

1. ATTACHMENT—VERIFICATION OF AFFIDAVIT.

The verification of an affidavit for attachment before the attorney of record of the plaintiff is unauthorized.

2. SAME—AMENDED AFFIDAVIT—AMOUNT OF DEBT.

If an affidavit for attachment does not contain a statement of the amount which the plaintiff ought to recover, the affidavit is defective and insufficient; and where no attempt is made to cure such an affidavit but by offering to file a new or amended affidavit, verified before the attorney of record of the plaintiff, the court or judge hearing a motion to dissolve the attachment commits no error in refusing to allow such affidavit to be filed or accepted, because such a verification is unauthorized, and therefore such new affidavit is also defective and insufficient.

Error from Johnson county.

On June 10, 1884, Tootle, Hanna & Co., of Kansas City, Missouri, instituted a civil action in the district court of Johnson county, Kansas, against Rufus Smith, of Gardner, Kansas, to recover the sum of \$2,600 then overdue upon an account and note given for goods, wares, and merchandise. On the same day they caused to be filed an affidavit for attachment against Rufus Smith. *The amount which plaintiffs sought to recover from the defendant was omitted from the affidavit.* On the same day an order of attachment issued, based upon said affidavit, for the sum of \$2,600 and \$50 probable costs of suit, and defendant's goods were attached, which were appraised at \$1,692.07. On July 5, 1884, the defendant appeared to the action, and filed a general demurrer to the first count or cause of action of the plaintiffs' petition, and put in a general denial to the second count or cause of action therein stated. On the twenty-first day of July, 1884, the defendant served notice on plaintiffs' attorney, in Kansas City, Missouri, to the effect that on the twenty-sixth day of said month, at Wyandotte, Kansas, before the Hon. W. R. WAGSTAFF, judge of said court, at chambers, he would move for a dissolution of the attachment for two certain reasons. On the same day the hearing was continued until Wednesday, July 30, 1884, at which time the hearing was continued until Saturday, August 2, 1884, at which time, and before the defendant's motion to dissolve came on for hearing, the plaintiffs asked leave of the judge to file an amended affidavit for attachment in said cause, which was refused by the said judge, to which action of the judge the plaintiffs excepted. The judge then proceeded to hear the proofs in support of the second ground of the said motion, to-wit, that the grounds set forth in the attachment affidavit were wholly untrue. The plaintiffs offered the pleadings, process, and proceedings in the case, as well as the affidavit of H. M. Tilliston, collector and adjuster for Tootle, Hanna & Co., William Ryley, of the firm of Ryley,

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Eby & Co., and William Peake, of the firm of Tootle, Hanna & Co. The defendant offered and read three affidavits made by himself; also affidavit of his wife, Belle Smith; affidavits of J. B. Ward and S. W. Barnard; also the original affidavit for attachment on behalf of plaintiffs in the action. The judge took the matter under advisement until August 6, 1884, and then sustained the defendant's motion *in toto*, to which action of the judge the plaintiffs then and there excepted; and by agreement of parties, and with consent of the judge, the plaintiffs were allowed 30 days from August 6, 1884, within which to make and serve "a case" for review in the supreme court. The plaintiffs now bring the case here.

A. Smith Devenney, for plaintiffs in error.

St. John & Pickering, for defendant in error.

HORTON, C. J. It is conceded that the affidavit for attachment was defective by reason of the omission of the amount sued for. Upon the hearing of the motion to dissolve, the district judge decided the affidavit void. *Robinson v. Burton*, 5 Kan. 293. The first complaint is that the judge erred in not granting the plaintiffs leave to amend the affidavit. The insufficient affidavit was sought to be cured by a new affidavit, relating back to the original signed by William Peake, and verified before John S. Harbison, the attorney of record of plaintiffs. This was unauthorized, and the judge properly rejected such new or amended affidavit. Sections 344, 345, 350 of the Code; *Foreman v. Carter*, 9 Kan. 681; *Warner v. Warner*, 11 Kan. 121. As no sufficient steps were taken by plaintiffs to cure or amend the original affidavit, the judge committed no error in dissolving the attachment. It is therefore useless to discuss the affidavits used upon the hearing. The defective and insufficient affidavit, in the absence of a sufficient amendment, settled the whole matter against the plaintiffs.

The order of the district judge will be affirmed.

(All the justices concurring.)

(33 Kan. 739)

MARKSON, Assignee, etc., v. BUCHAN, Trustee, etc.

Filed July 9, 1885.

1. MORTGAGE—NOTE TO SECURE PAYMENT OF STOCKS IN INSURANCE COMPANY—SURRENDER BY STATE OFFICERS—SALE—LIEN.

Where a stockholder in an insurance company of this state, to secure the payment of his stock, gives his note secured by a mortgage upon his real estate, and afterwards, in good faith, sells and transfers his stock to other parties, who become stockholders in the corporation, and subsequently the note and mortgage, which were deposited by the corporation with the treasurer of the state, under and in pursuance of sections 16 and 49 of the act to establish an insurance department in the state of Kansas, approved March 1, 1871, are surrendered to the corporation, and the corporation proceeds to wind up its business affairs, and decides to surrender its securities given in payment of stock to its present stockholders, but before so doing makes an assessment upon the shares of stock owned by the several stockholders to raise money to pay the outstanding debts of the corporation, and the stockholders, who have purchased the

stock for which the said note and mortgage were given, pay the assessments upon their shares of stock and receive from the corporation, in good faith, the transfer of said note and mortgage, *held*, that the surrender of the note and mortgage by the officials of the state to the corporation does not release or discharge the mortgage. *Held, further*, that the sale and transfer of the note and mortgage by the corporation to the stockholders who purchased the stock for which said note and mortgage were given does not satisfy the note and mortgage; and *also held*, that the owner and holder of said mortgage, under the said transfer from the corporation, has a prior lien upon the lands embraced therein to any judgment obtained against the maker of said note and mortgage subsequent to their execution.

2. SAME—REINSURANCE IN ANOTHER COMPANY—ASSESSMENTS.

Where a life insurance company of this state, about to wind up its business, insures its outstanding policies in another life insurance company of another state, and enters into a contract with said insurance company whereby, among other things, it is agreed to the effect "that the notes and mortgages given by the stockholders to secure their stock issued by the first-named company should be returned to the parties who gave the same, or their assigns, upon the execution of that contract, or as soon thereafter as practicable," *held*, that the life insurance company so reinsuring its policies has the right to retain the notes and mortgages given by its stockholders to secure their stock until all the outstanding debts of the society are paid, and all equities are adjusted between the company and its stockholders. *Held, further*, that to raise money to pay its outstanding debts it has the right to make assessments upon the shares of stock owned by its several stockholders, and to dispose of to its stockholders paying assessments upon their stock the notes and mortgages given to secure the identical stock upon which such assessments are made and paid.

Error from Leavenworth county.

L. B. & S. E. Wheat and J. H. Gilpatrick, for plaintiff in error.

Keeler & Gephart, Lucien Baker, Stillings & Stillings, H. Miles Moore, and H. W. Ide, for defendants in error.

HORTON, C. J. The controversy in this case is between Herman Markson, as assignee of the Leavenworth Savings Bank, and W. J. Buchan, as trustee for A. T. Hines and others, as to which of them is entitled to the proceeds arising from the sale of certain lands embraced in two mortgages executed July 1, 1873, and April 26, 1875, by George R. Hines and wife. On October 20, 1877, Markson, as assignee, recovered in the United States district court for Kansas a judgment against George R. Hines for \$12,444, and costs, and claims that this judgment is a first lien upon all the lands embraced in the said mortgages not released. The district court rendered judgment on July 4, 1884, in favor of Buchan, as trustee, against George R. Hines, upon his note executed July 1, 1873, of \$13,250, for the principal and all interest due upon said note, and decreed that the lands embraced in said mortgages given to secure this note, and not released, should be sold, and the proceeds, after payment of certain taxes, improvements, and costs, should be applied—*First*, to the amount found due Buchan, as trustee, upon the note of Geo. R. Hines of July 1, 1873; and, *second*, to the payment of the judgment recovered by Markson, as assignee, against George R. Hines, on October 20, 1877.

The promissory note of George R. Hines of July 1, 1873, and the mortgages of July 1, 1873, and April 26, 1875, were given to the Al-

liance Mutual Life Assurance Society to secure the payment of 132½ shares of capital stock of that corporation, owned by George R. Hines at the time of the execution of the note and mortgages. Soon after the execution of the note it and the first mortgage were deposited by the Life Assurance Society with the treasurer of the state of Kansas, in pursuance of sections 16 and 49 of the act to establish an insurance department in the state of Kansas, approved March 1, 1871. The note came due on the first [third] of July, 1878. On September 29, 1876, a written contract was executed between the Life Assurance Society and the Pacific Life Insurance Company of California, whereby the latter company insured the outstanding policies held by the Life Assurance Society. In the contract between these insurance companies it was provided, among other things, that—

“For and in consideration of the promises, covenants, and agreements of the Life Assurance Society, hereafter contained, the Pacific Life Insurance Company, its successors or assigns, does hereby promise, covenant, and agree to and hereby does reinsure to said party of the second part, and to each and all of the said second party's policy-holders or their assigns, any and all risk and risks upon the lives of individuals now outstanding and in force, and hereby guaranties unto said party of the second part, and each and all said policy-holders, that the said risks due, or as the same may become due, shall and will be, by said party of the first part, promptly and duly paid according to said several policies or contracts, and to assume, and does hereby assume and promise to pay and discharge all debts and liabilities of every nature and kind whatever of said party of the second part, as per schedule hereto attached; and by virtue and force of the said assumption and promise it is intended, and said party of the first part hereby agrees, that each policy-holder of the party of the second part, who may choose so to do, may have and maintain and enforce his or their legal claim or claims directly against said party of the first part, its successors or assigns, and take notice of loss or demand as against said second party, and in the same manner and with like effect as they might have enforced and maintained his, her, or their claim or claims against said party of the second part; and the said party of the first part does hereby, in consideration as aforesaid, further promise, covenant, and agree to save, keep harmless, and indemnify said party of the second part, its successors or assigns, from and against any and all debts and liabilities, costs, payments, expenses or demands of every kind and description, in law and equity, or otherwise, at the date of this instrument outstanding and in force against said party of the second part, or that may hereafter accrue or exist against said party of the second part, on account, by reason, or in any way growing out of any liability or demand of any kind now existing against said party of the second part on account of its policy liabilities, but said party of the first part hereby reserves all legal defense to said demand or liabilities, or either of them.”

It was agreed further in the contract that—

“All the mortgages and notes given by the stockholders of the Life Assurance Society to secure the payment of their stock should be returned to the parties who gave the same, or their assigns, upon the execution of the contract, or as soon thereafter as practicable.”

After the execution of this contract between the insurance companies, the Life Assurance Society commenced to close up its business, and on March 9, 1880, a resolution was adopted by the stockholders of

the company "that the affairs of the corporation be immediately closed up and the securities be surrendered to the respective shareholders." The board of directors of the corporation were also directed by the stockholders at said time to dispose of the securities as follows: That "when received (from the superintendent of insurance of the state) they be delivered to the present owners of the stock for the payment of which said securities were respectively given." The resolutions of the stockholders were adopted by the board of directors on March 10, 1880. On March 27, 1880, the board of directors, among other things, adopted the following:

"Resolved, that the owners of stock in that company be requested to pay the amount of three per cent. on their capital stock, and that the money so paid shall be used as a fund to take up all outstanding debts of this company, the money so paid to be paid into the hands of G. H. Hyde, and to be expended under the direction of the executive committee for the purpose aforesaid, and the claim so taken up to be assigned to said G. H. Hyde, to be held by him against said company to the full amount thereof till settled as herein provided. As soon as all debts against the company shall be taken up and the securities held by the officers of the state can be surrendered and assigned to any holder of such stock who shall contribute as much or more than his proportion of the amount necessary to take up said debts, and the securities of all who fail to so contribute shall be foreclosed, and the money arising from such foreclosure shall be applied to the expense of the same and to the payment of the share which the holder of the stock is liable on the debt so taken up."

On April 12, 1880, the board of directors took the following action:

"Resolved, that proceedings be commenced to foreclose all mortgages given for stock on which assessment shall not be paid, as heretofore called, within thirty days from this date, and that the executive committee secure counsel and make all necessary arrangements for the foreclosure of said mortgages; and that George H. Hyde is authorized to order the board of directors of said society to transfer to the holders of the stock the securities given for payment of the stock, upon payment of the assessment made therefor aforesaid."

At the July term of this court for 1881, in the case of the *Life Assurance Soc. v. Welch*, 26 Kan. 632, judgment was rendered in favor of the society, compelling the superintendent to deliver up to the Assurance Society all securities belonging to the company and deposited with the treasurer of state, except an amount of such securities equal to what was known as the reserve liability on the outstanding policies of the company. The note of July 1, 1873, of \$13,250, and the first mortgage to secure the same, remained with the treasurer of state, under the deposit of the Life Assurance Society, to about December 8, 1881, when, in pursuance of the judgment of this court, the note and mortgage were returned to the Assurance Society. Afterwards the directors of the society made assessments amounting to \$500 on the 132½ shares of capital stock, which was, in March, 1882, paid by William Buchan, A. T. Hines, G. Y. Bryant, and E. S. Bartlett, as the owners of said shares. The transfer and sale to W. J. Buchan, as trustee, etc., of the note of July 1, 1873, and the mortgages given to secure the same, was the payment of \$500, in pursuance of said res-

olutions heretofore cited and the assessments thereunder, and the transfer to him, and the parties he represented, of their portion of the assets of the Assurance Society on account of their being stockholders of stock for which the note and mortgages had been given.

The theory upon which Markson bases his claim that he is entitled to the proceeds of the sale of the lands embraced in the mortgages and ordered to be sold, prior to Buchan, as trustee, is that he acquired a lien against the lands at the date of his judgment, as assignee, on October 20, 1877, and that as the note and mortgages were returned to the Life Assurance Society in pursuance of the contract between the Pacific Mutual Life Insurance Company of California and said society, and under the judgment of this court, rendered in the action of the Life Assurance Society against Orrin T. Welch, as superintendent of insurance, said note was thereby discharged and the mortgages released and wiped out, subject only to the rights of the policyholders of the society and the insurance department in relation thereto. It is also contended by Markson that the Life Assurance Society received the note and mortgages from the state treasurer in December, 1881, as fully satisfied, to be surrendered to George R. Hines as discharged. It is further contended that the Life Assurance Society, having provided substantially for the discharge of the notes and mortgages by the contract of September 29, 1876, it was not competent or in the power of the society to afterwards dispose of the note and mortgages to Buchan, or any other parties. The notes and mortgages are also claimed to have been released and discharged for various other reasons. It is sufficient, however, to say that, in our opinion, all of these claims are untenable. The evidence produced before the trial court is not before us. The findings of that court, therefore, must be taken as conclusive.

One of the findings is, "that the said W. J. Buchan and the other parties for whom he is trustee in this suit are and were *bona fide* holders of said stock, and had been for a long time before the institution of this suit, and before the rendition of the judgment in the circuit court of the United States for the district of Kansas, at its June term, in 1881, in the action pending in that court, by James N. Burnes, as administrator, etc., and Herman Markson, as assignee, etc., against George R. Hines, A. T. Hines, G. W. Bryant, and others." In the latter action the complainants were defeated as to said stock; and, under the decree and judgment of that court, Buchan and the parties for whom he is trustee were decided to have been, prior to 1878, the *bona fide* owners of the stock issued in the first instance, to George R. Hines. Here was an adjudication against Markson that Hines had not fraudulently disposed of his stock, and that Markson had no lien or claim thereon. This matter cannot be relitigated in this suit. When the note and mortgages were returned from the state treasurer to the Life Assurance Society, in December, 1881, George R. Hines had sold and transferred all of his stock to Buchan, A. T. Hines, and others.

The resolutions of the stockholders of the Life Assurance Society of March 9, 1880, which were subsequently adopted by the board of directors, looked to the closing up of the affairs of the society; but, before the note and mortgages were returned to the parties who gave the same, or their assigns, or any demand was made therefor, the subsequent resolution of March 27, 1880, was adopted, requiring the owners of the capital stock in the society to pay an assessment of 3 per cent. on their stock to take up outstanding debts of the company. Buchan, Hines, and the other parties, as the owners of the stock issued to George R. Hines, paid this assessment, and subsequently received the transfer of the notes and mortgages. Neither the Life Assurance Society, nor the Pacific Mutual Life Insurance Company, nor any of the stockholders of either company, nor any of the creditors of said corporations, are here objecting to the resolution or proceedings of the Life Assurance Society in making assessments upon its stockholders, or in disposing of its securities. No fraud is established, or can be assumed, from any of the findings, and Markson, who has, as assignee, simply a judgment against George R. Hines, cannot, against the findings of the trial court, question the *bona fides* of Buchan, as trustee, in obtaining the note and mortgages in suit.

Markson has no judgment against Buchan, or any of the parties he represents; no judgment against the Life Assurance Society; and is in no way the representative of the Pacific Mutual Life Insurance Company. As George R. Hines sold and disposed of his stock in the Life Assurance Society before 1878, it was not the proper thing for the society, in the matter of closing up its affairs, to return to him the note and mortgages, because Buchan, and the parties he represents, paid the assessment on the stock originally issued to him, and, further, because by the resolutions of the stockholders and directors of the society, the securities, when received from the state treasury, were to be delivered to the present owners of the stock, while the contract between the insurance companies of September 29, 1876, provided "the notes and mortgages given by the stockholders to secure their stock issued by the Life Assurance Society should be returned to the parties who gave the same, or their assigns, upon the execution of that contract, or as soon thereafter as practicable;" yet the Life Assurance Society had the right to retain such notes and mortgages until all outstanding debts of the society had been paid and all equities adjusted.

It is true that the Pacific Mutual Life Insurance Company obligated itself to pay certain claims and debts of the Life Assurance Society, and under such contract it was adjudged liable to pay the costs and expenses of the prosecution of the action of the Life Assurance Society against Orrin T. Welch, tried in this court; but there is no finding of the court that the Pacific Mutual Life Insurance Company, at the date of the assessments under the resolutions of March 27, 1880, had paid the debts for which said assessments were made, nor

can we judge from the contract or the findings that there was any liability upon the part of said Pacific Mutual Life Insurance Company to pay the particular outstanding debts of the Life Assurance Society for which said assessments were made and collected. Therefore, we cannot assume from the contract or the findings of the trial court that the assessments made upon the stock owned by Buchan and others were unnecessary and invalid.

Something is said to the effect that the judgment of the United States circuit court of June, 1881, would have been different if the note and mortgages had been surrendered to the Life Assurance Society when the action was commenced. There is a statement in the opinion filed in that case that if the securities had been surrendered at the commencement of the action the matter would have been considered in the determination of the cause. This is about all. It, however, appears from the opinion that in the investigation of the transactions of George R. Hines in that case that no fraud was established upon his part, and the court makes the positive finding therein that certain shares of stock held by A. T. Hines in the Life Assurance Society were transferred to him in good faith.

The judgment of the district court will be affirmed.

(All the justices concurring.)

(34 Kan. 8)

GRIBBEN, Guardian, etc., v. MAXWELL.

Filed July 9, 1885.

VENDOR AND VENDEE—DEED EXECUTED BY INSANE GRANTOR.

Where a purchase of real estate from an insane person is made, and a conveyance is obtained in perfect good faith, before an inquisition and finding of lunacy, for a fair and reasonable consideration, without knowledge of the insanity, and no advantage is taken by the purchaser, the conveyance cannot be avoided by the insane person, or one representing him, if the consideration has not been returned to the purchaser and no offer has been made to return the same.

Error from Cowley county.

Action commenced December 7, 1883, by Noah Gribben, as guardian of Olive E. Gribben, a lunatic, against Samuel E. Maxwell, to set aside a conveyance executed by Olive E. Gribben, on June 11, 1883. The petition, among other things, alleged that on June 11, 1883, the said Olive E. Gribben, being a lunatic, made, executed, acknowledged, and delivered to the defendant a quitclaim deed for three-sevenths interest of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 15, and the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 14, all in township No. 34 S., of range 4 E., in Cowley county, in this state. The defendant filed an answer, the second defense of which was as follows:

"That he purchased of the said Olive E. Gribben the lands described in said petition in good faith; that he paid to the said Olive E. Gribben for said lands the sum of three hundred and fifty dollars lawful money of the United States; that the said sum of money, paid for said lands as aforesaid, was a fair and

reasonable price for the same at the time said purchase was made; that the said defendant had no knowledge or information of the lunacy of the said Olive E. Gribben; that at the said time, and before, there was nothing in the looks or conduct of the said Olive E. Gribben to indicate she was of unsound mind, or incapable of the transaction of business; but, on the contrary, at the time of said purchase, and for a long time prior thereto, the said Olive E. Gribben was apparently in possession of her full mental faculties, and was then, and had been for a long time prior thereto, engaged in the transaction of business for herself.

"Wherefore, the said defendant prays the said petition of the said plaintiff be dismissed, and that the title of the said defendant in and to the said lands be quieted against the claims of the said Olive E. Gribben, and all persons claiming or to claim under, through, or by her, and for such other and further relief as to the court may seem equitable."

To the second defense of the answer the plaintiff filed a demurrer, upon the ground that it was insufficient in law to constitute any defense whatever. At the May term of the court for 1884 the demurrer was overruled. The plaintiff excepted, and brings the case here.

Hackney & Asp, for plaintiff in error.

A. J. Pyburn, for defendant in error.

HORTON, C. J. As a general rule, the contract of a lunatic is void *per se*. The concurring assent of two minds is wanting. "They who have no mind 'cannot concur in mind' with one another; and, as this is the essence of a contract, they cannot enter into a contract." 1 Pars. Cont. (6th Ed.) 383; *Powell v. Powell*, 18 Kan. 371. Notwithstanding this recognized doctrine, the decided cases are far from being uniform on the subject of the liability or extent of liability of lunatics for their contracts. An examination of the cases upon the subject shows that there is an irreconcilable conflict in the authorities. We think, however, the weight of authority favors the rule that where the purchase of real estate from an insane person is made, and a deed of conveyance is obtained in perfect good faith, before an inquiry and finding of lunacy, for a sufficient consideration, without knowledge of the lunacy, and no advantage is taken by the purchaser, the consideration received by the lunatic must be returned, or offered to be returned, before the conveyance can be set aside at the suit of the alleged lunatic, or one who represents him. WRIGHT, C. J., in *Corbit v. Smith*, 7 Iowa, 60, thus states the law:

"In the next place, a distinction is to be borne in mind between contracts executed and contracts executory. The latter the courts will not in general lend their aid to execute, where the party sought to be affected was at the time incapable, unless it may be for necessities. If, on the other hand, the incapacity was unknown, no advantage was taken, the contract has been executed, and the parties cannot be put *in statu quo*, it will not be set aside."

In *Behrens v. McKenzie*, 23 Iowa, 333, DILLON, J., said:

"But, with respect to executed contracts, the tendency of modern decision is to hold persons of unsound mind liable in cases where the transaction is in the ordinary course of business, is fair and reasonable, and the mental condition was not known to the other party, and the parties cannot be put *in statu quo*."

In *Allen v. Berryhill*, 27 Iowa, 534, it was decided:

"That where a contract made by an insane person has been adopted, and is sought to be enforced by the representatives of such person, it is no defense to the sane party to show that the other party was *non compos mentis* at the time the contract was made."

COLE, J., dissenting, expressed his views as follows:

"In every case of contract with a lunatic, which has been executed in whole or in part, the fact that the parties can or cannot be placed *in statu quo* will have an important bearing in determining whether such contract shall stand. * * * When the parties cannot be placed *in statu quo*, and the contract is fair, was made in good faith, and without knowledge of the lunacy, it will not be set aside, even at the suit of the lunatic. And this, not because the contract was valid or binding, but because an innocent party, one entirely without fault or negligence, might, and in the eyes of the law would, be prejudiced by setting it aside. Both parties are faultless, and therefore stand equal before the law; and in the forum of conscience the law will not lend its active interposition to effectuate a wrong or prejudice to either. It will suffer the misfortune to remain where nature has cast it."

In *Bank v. Moore*, 78 Pa. St. 407, a lunatic was held liable upon a note discounted by him at the bank, and Mr. Justice Paxson, in delivering the opinion of the court, said, among other things:

"Insanity is one of the most mysterious diseases to which humanity is subject. It assumes such varied forms, and produces such opposite effects, as frequently to baffle the ripest professional skill and the keenest observation. In some instances it affects the mind only in its relation to or connection with the particular subject, leaving it sound and rational upon all other subjects. Many insane persons drive as thrifty a bargain as the shrewdest business man, without betraying in manner or conversation the faintest trace of mental derangement. It would be an unreasonable and unjust rule that such persons should be allowed to retain the property of innocent parties, and retain both the property and its price. Here, the bank in good faith loaned the defendant the money on his note. The contract was executed, so far as the consideration is concerned, and it would be alike derogatory to sound law and good morals that he should be allowed to retain it to swell the *corpus* of his estate."

Mr. Pomeroy, in his treatise on Equity Jurisprudence, says:

"In general, a lunatic, idiot, or person completely *non compos mentis*, is incapable of giving a true consent in equity, as at law. His conveyance or contract is invalid, and will generally be set aside. While this rule is generally true, the mere fact that a party to an agreement was a lunatic will not operate as a defense to its enforcement, or as ground for its cancellation. A contract executed or executory, made with a lunatic in good faith, without any advantage taken of his position, and for his own benefit, is valid both in equity and at law. And where a conveyance or contract is made in ignorance of the insanity, with no advantage taken, and with perfect good faith, a court of equity will not set it aside, if the parties cannot be restored to their original position, and injustice would be done." Volume 2, § 946, p. 465. See, also, *Scanlan v. Cobb*, 85 Ill. 296; *Young v. Stevens*, 48 N. H. 133; *Eaton v. Eaton*, 37 N. J. Law, 108; *Freed v. Brown*, 55 Ind. 310; *Ashcraft v. De Armond*, 44 Iowa, 229.

Applying the law thus declared in the case at bar, the district court committed no error in overruling the demurrer. It appears from the

pleadings that the conveyance was executed and delivered before an inquisition and finding of lunacy; that no offer was made to return to the purchaser his money paid for the conveyance of the land; and the answer sets forth good faith on the part of the purchaser; that he paid a fair and reasonable price for the land; that he had no knowledge or information of the lunacy of Olive E. Gribben, the ward of the plaintiff; that there was nothing in her looks or conduct at the time to indicate that she was of unsound mind, or incapable of transacting business, but, on the contrary, that she was apparently in possession of her full mental faculties, and was then, and had been for a long time prior, engaged in the transaction of business for herself. Our attention is called to the case of *Powell v. Powell*, *supra*, as decisive that the conveyance in question is void; but a consideration of the views above expressed and the authorities cited shows that all the reasons to avoid a marriage with a lunatic do not apply in the case of a deed obtained in good faith from a lunatic, executed before an inquisition and finding of lunacy. We have examined fully the authorities on the other side of the question, and especially *In re Desilver*, 5 Rawle, (1835,) 111; *Gibson v. Soper*, 6 Gray, 279; *Van Deusen v. Sweet*, 51 N. Y. 378; *Dexter v. Hall*, 82 U. S. (15 Wall.) 9.

Notwithstanding the recognized ability of the judges rendering these decisions, we are better satisfied with the doctrine herein announced. The order and judgment of the district court will be affirmed.

(All the justices concurring.)

(33 Kan. 702)

KANSAS CITY, FT. S. & G. R. CO. v. LANE.

Filed July 9, 1885.

1. RAILROAD COMPANY—NEGLIGENT KILLING OF STOCK.

In this action, which is brought to recover damages against the railroad company for the negligent killing of stock, where the railroad crosses a public highway, the testimony is examined, and *held* to be sufficient to sustain the verdict and judgment.

2. SAME—STOPPING TRAIN—INSTRUCTION.

An instruction given by the court "that if the jury believe the train which killed the plaintiff's cows could not have been stopped after the engineer saw the cows on the track, and before they were struck, you will find for the defendant: provided, the jury believe from the evidence the engineer in charge of said train used ordinary diligence, as herein explained."—*held* not erroneous.

3. SAME—ERROR WITHOUT PREJUDICE.

Where an instruction is given that is really in the interest of, and not prejudicial to, the plaintiff in error, he is not in a position to complain thereof.

4. SAME—WHISTLE—RINGING BELL—EVIDENCE.

A refusal to charge the jury that the evidence of the plaintiff in regard to sounding the whistle and ringing the bell of the locomotive was of a negative character, while that of the defendant was positive, and that the law esteems the latter class of evidence more highly and of more value than the former, was not error, because it ignored all modifying circumstances, and assumed that there was no positive evidence of the alleged signal given in behalf of plaintiff,

whereas it appears that positive testimony with reference thereto had been offered by him.

6. **SAME—CREDIBILITY OF WITNESS.**

As a general rule, the testimony of one who swears positively that a locomotive whistle was sounded is of much greater value than the statement of a witness that he did not hear it sounded. Such negative testimony by a witness who was not giving heed to the passing locomotive, or the sounding of the whistle thereon, and who is accustomed to the frequent sounding of the same, is ordinarily entitled to but little weight.

Error from Miami county.

Wallace Pratt and Blair & Perry, for plaintiff in error.

Beeson & Baker, for defendant in error.

JOHNSTON, J. This action was brought by George W. Lane against the Kansas City, Fort Scott & Gulf Railroad Company, to recover damages for the alleged negligent killing of two cows, belonging to the plaintiff, on the eighth day of December, 1882, at a point near the city of Paola, in Miami county, where the defendant's railroad crosses a public highway. It was alleged by the plaintiff that the cows were struck and killed by the defendant's locomotive and passenger train, which was going north at a high rate of speed, and that the railroad track for a distance of 80 rods south of the point of crossing this highway is nearly straight and level, so that any obstacle upon the track could have been readily seen by the persons in charge of the locomotive. But it is charged that, on approaching the highway crossing, the employees of the defendant failed to blow the locomotive whistle, as is required to be done, and failed to ring the bell, or give any signal whatever of their approach. And the plaintiff charges that the killing of the cows was the result of the recklessness and negligent management of the locomotive and train. The plaintiff further charges that defendant skinned the two cows and appropriated their hides to its own use.

The defendant denied that it negligently and carelessly killed the cows, but admitted the taking of the hides, and offered to confess judgment for their value. A trial was had at the May term, 1883, of the district court of that county, and a judgment rendered in favor of the plaintiff for the value of the hides only, and thereupon the plaintiff prosecuted a petition in error in this court to reverse that judgment, and at the January term, 1884, of this court the judgment was reversed, and the cause remanded for a new trial. *Lane v. Kansas City, Ft. S. & G. R. Co.* 31 Kan. 525; S. C. 3 PAC. REP. 341. Upon the second trial, which was before the court and a jury, it was admitted by the defendant that the plaintiff was the owner of the cows at the time they were killed, and that they were of the value of \$100, as claimed by the plaintiff; and also that the cows were killed by the defendant's engine and train of cars at the time and place stated by plaintiff, but not negligently. The verdict and judgment were in favor of the plaintiff for the agreed value of the cows, and the defendant now comes here alleging error. The assignments of error assail the rulings of the court in giving and refusing instruc-

tions, in the admission of testimony, and in overruling the motion for a new trial.

1. The court in its third instruction told the jury, among other things, that—

“In cases of apprehended danger it is the duty of persons in charge of a running train, on approaching the crossing of a public highway, to take such precautions as reasonable care would suggest, taking into consideration the safety of its patrons and passengers using and riding on the train, and if, in the exercise of such precaution and care, in the judgment of the engineer in charge of the train, there was greater danger to the train and its passengers in attempting to stop it after he did see or could have seen the cows on the track, he would be justified in keeping on, although he may have knocked the cows from the track; and whether such necessity existed or not must be determined by the jury from all the facts and circumstances of the case, as shown by the evidence on the trial.

It is objected that this instruction assumed that there was apprehended danger when the train was approaching the crossing where the cows were killed, and is therefore misleading. It is not, we think, open to the criticism made. The court does not therein intimate an opinion that danger existed, or that it was apprehended by the engineer, but the instruction was obviously founded upon the claim made and the testimony offered on the part of the railroad company. The engineer in charge of the locomotive testified that he did not reverse the engine after seeing the cows upon the track; that the cows were not seen by him until he was within about 150 yards of the crossing; that the train was running at the rate of about 40 miles an hour, and there would have been great danger in stopping the train by reversing the engine, as it probably would have thrown the train off of the track. It will therefore be seen that the instruction was really in the interest of and beneficial to the defendant, and the defendant, at least, has no reason to complain of being prejudiced by it.

2. The court instructed the jury as follows:

“(8) If the jury believe the train which killed the plaintiff's cows could not have been stopped after the engineer saw the cows on the track, and before they were struck, you will find for the defendant: provided, the jury believe from the evidence the engineer in charge of said train used ordinary diligence, as herein explained.”

The defendant insists that this instruction should not have been limited by the proviso. We think that without the proviso the instruction would have been erroneous, as it would have taken from the jury all inquiry into the conduct of the engineer as to the proper care and diligence required of him prior to the time when he claims to have first seen the cows. The statute imposed the duty of sounding the whistle three times, at least 80 rods from the crossing. It was further his duty to be upon the lookout for obstructions on the track, and, if anywhere seen, to give such signals as the circumstances of the case required. If the proviso had been eliminated from the instruction, as desired by the defendant, it would have relieved the en-

gineer from exercising these acts of precaution and care. The objections, therefore, to this instruction, as well as the ninth, are not well founded.

3. Error is assigned on the refusal of the court to give the second and third instructions required by the defendant, both of which relate to contributory negligence. This objection is met by the fact that the rules respecting the degree of care and diligence required of the plaintiff, and applicable to the facts in the case, were fairly and fully stated by the court in its general charge. Not only this, but in the second instruction requested the court was asked, in effect, to direct the jury that, if the plaintiff drove his stock upon or near the track where trains were likely to be approaching, he could not recover. Whether there is danger or negligence in driving stock near to a railroad track depends upon circumstances, and is a question to be determined by the jury after learning what the circumstances are. If the stock were under perfect control, and carefully guarded, the driving of them *near* to the track, as upon the adjoining and parallel highway, would not necessarily constitute negligence. Numerous other circumstances may readily be conceived where such an act would not be negligence. The third instruction requested by the defendant contained a direction to the jury that if there was a sign-board near the point where the highway crossed the railroad, notifying every one who used the road to "look out for the cars," they should find for the defendant. Clearly, this direction would have been wrong, and for this reason alone was properly refused.

4. Complaint is also made of the ruling of the court in refusing to instruct the jury that the evidence of the plaintiff in regard to sounding the whistle and ringing the bell of the locomotive was of a negative character, while that of the defendant was positive, and that the law esteems the latter class of evidence more highly and of more value than the former. As a general rule, the testimony of one who swears positively that the whistle of a locomotive was sounded is of much more value than the statement of a witness that he did not hear it sounded. Such negative testimony by a witness who was not giving heed to the passing locomotive or the sounding of the whistle thereon, and who may have been accustomed to the frequent sounding of the whistle, is entitled to but little weight. But while the request, as a general statement of the rule of evidence, is correct, we do not regard its refusal as error. As presented, it ignored all modifying circumstances, and assumed that no positive testimony was offered by the plaintiff that no signal was given. The testimony of one who was in a position to hear, and who was giving special attention to the sounding of the whistle, that it was not sounded, while negative in form, is a positive statement of fact; and where the witnesses had equal opportunity to hear the whistle, and are equally credible, it is generally of as much value as the testimony of one who states that it was sounded. In this case, one of the witnesses, W. J.

Richards, who was near by and saw the collision, testified that when he observed the approach of the train, and that the cows were in danger of being killed, he determined to notice whether any signals were given, and called the attention of his wife to it, stating that "I'll bet a hundred and fifty dollars they don't whistle or ring;" and he swears positively that the whistle was not sounded nor the bell rung until after the cows had been struck and killed. In view of this testimony the refusal of the request was not error.

5. An exception was taken to the ruling of the court in not permitting a witness to state what the general habit and custom of the engineer in charge of the locomotive had been with reference to sounding the whistle on the approach of road crossings. Waiving the question of the admissibility of this testimony, which it is not necessary to decide now, we find from the record that later in the trial the question was repeated, and the court allowed the witness to answer it, and therefore the defendant has no reason for complaint.

Upon the final objection that the testimony does not sustain the judgment, it is sufficient to say that an examination of the record satisfies us that the testimony, although not as satisfactory in some respects as might be desired, is sufficient to uphold the judgment. We see nothing else in the record that needs to be noticed, and, finding no error, the judgment of the district court must be affirmed.

(All the justices concurring.)

(33 Kan. 708)

STATE v. BROOKS.

Filed July 9, 1885.

1. INTOXICATING LIQUORS—VIOLATION OF PROHIBITORY LAW—JURISDICTION OF DISTRICT COURT.

The district court has original and concurrent jurisdiction with justices of the peace to hear and determine criminal prosecutions for violations of the prohibitory liquor law of 1881, where the punishment to be imposed cannot exceed a fine of \$500, or imprisonment in the county jail one year.

2. SAME—INFORMATION.

And the prosecution in the district court may be upon information filed by the county attorney.

3. SAME—ARREST—TRIAL.

And where such information states an offense, and is sworn to positively by some person, it is sufficient of itself to authorize the clerk to issue a warrant for the arrest of the defendant, without any finding by the clerk or other person of probable cause to believe the defendant guilty of the offense, and is sufficient to authorize the district court to put the defendant upon his trial.

4. SAME—VERIFICATION OF INFORMATION.

Where an information is sworn to positively by some person, it is not necessary for the county attorney to also verify the information by his own oath.

5. SAME—STATING TIME WHEN OFFENSE WAS COMMITTED.

Where a county attorney files an information on October 15, 1884, and states that the offense was committed on the _____ day of _____, 1884, and does not state the day or the month when the offense was committed, *held*, that the information is, nevertheless, sufficient.

6. SAME—KIND OF LIQUOR SOLD.

In prosecutions for selling intoxicating liquor in violation of the prohibitory

liquor law of 1881, it is not necessary to state the kind of intoxicating liquor sold, nor the person to whom sold.

7. SAME—CONVICTION—EVIDENCE.

Where the information is verified by the oath of a private person, and not by the county attorney, the defendant should not be found guilty of any offense, except some offense of which the complaining witness had notice or knowledge at the time of verifying the information.

8. SAME—COSTS.

Where a defendant is prosecuted in separate counts for several violations of the prohibitory liquor law, and is found guilty under some of the counts and not guilty under the others, he should not be required to pay costs accruing under the counts under which he is acquitted, but should recover costs.

Appeal from Allen county.

S. B. Bradford, Atty. Gen., and *G. A. Amos*, for appellee.

G. P. Smith, for appellant.

VALENTINE, J. This was a criminal prosecution under the prohibitory liquor law of 1881. The information was filed in the district court of Allen county on October 15, 1884, by the county attorney, charging the defendant, Hiram Brooks, in four separate counts, with four separate violations of said law. Each offense was charged as having been committed on the ——— day of ———, A. D. 1884; and while it is charged that the defendant sold intoxicating liquors in violation of law, yet the kind of intoxicating liquors sold is not stated, nor is the name of the person, to whom the liquors were sold, given. The information was sworn to positively by J. C. Gilbert, a private citizen, and the county attorney did not verify the same by his own oath. The defendant made several motions, among which were motions to quash the information and to have himself discharged from arrest; which motions were overruled by the court, and the defendant excepted. The defendant was duly arraigned, but refused to plead, and the plea of "not guilty" was entered for him. A trial was had before the court and a jury. Evidence was introduced tending to show that the defendant had sold intoxicating liquors to various persons at various times in violation of law. The state then elected to rely for a conviction under the first count of the information upon a sale of whisky made by the defendant to Oscar Dwindle,—a sale with reference to which the prosecuting witness, J. C. Gilbert, had no knowledge or notice; and the prosecution also made elections with reference to the other counts. The court instructed the jury, and the defendant duly excepted to the instructions as given. The jury found the defendant guilty under the first count of the information, and not guilty under the other counts. The defendant moved for a new trial upon various grounds, which motion was overruled by the court, and the defendant excepted. The court then sentenced the defendant to be confined in the county jail for 30 days, and to "pay the costs of this proceeding," and that he stand committed to the county jail until the costs were paid; to which sentence and judgment the defendant excepted, and now appeals to this court.

We think the information is sufficient. It states a cause of action

in each count against the defendant, and although it is claimed to be an information, and it is in fact an information, yet in essence and in substance it is also a complaint, within the requirements of the prohibitory liquor law. The offenses charged therein are misdemeanors, in which the punishment for each offense cannot exceed a fine of \$500 and imprisonment one year; and it has been held several times by this court that the district court has original and concurrent jurisdiction with justices of the peace to hear and determine such cases. In justices' courts the original pleading may be properly called a complaint, but in the district court it may properly be called an information or indictment; for, in the district court, criminal prosecutions can be conducted or carried on only upon informations filed by the public prosecutor, or upon indictments found by the grand jury. Crim. Code in general, and articles 6, 7 especially. See, also, sections 21, 22 of the prohibitory act. The information sets forth facts sufficient to constitute four separate offenses, and all the facts constituting the offenses are set forth in detail and in full, except as heretofore stated; and the information is duly verified by the positive oath of J. C. Gilbert, and is sufficiently verified within the decision made by this court in the case of *State v. Gleason*, 32 Kan. 245; S. C. 4 Pac. Rep. 363.

Under such circumstances we do not think that it was necessary for the county attorney to also verify the information, nor do we think that the failure of the county attorney to state the day and the month when the offenses were committed renders the information insufficient; for it is never necessary, in criminal prosecutions, to prove the allegations merely setting forth the day or the month when the offenses are alleged to have been committed. All that is necessary to be proved in any case like this is that the particular offense charged was committed within such a time that the prosecution therefor is not barred by the statute of limitations; or, in other words, all that is necessary to be proved is that the offense was committed within two years next preceding the time of the filing of the information. The information in the present case stated that the offenses were committed in the year 1884, and, as before stated, this information was filed on October 15, 1884. We think the information was sufficient in this particular. Authorities may be found, however, holding that it is necessary in charging criminal offenses to state a particular day and the particular month when the offense was committed; but as all the authorities agree that such allegations need not be proved, and that they answer no material purpose, it would seem that such allegations are wholly unnecessary and immaterial. Neither is it necessary in this state to state the kind of liquor sold, or the name of the person to whom sold, for the statute expressly and specifically provides that these things need not be stated. Prohib. Liquor Law, § 21. Of course, the information in this case might have been made better than it was, and we think it ought to have been made better; but still we think it was and is sufficient. Taking

the facts therein stated, and the positive oath of Gilbert, it showed probable cause to believe that the defendant was guilty of the offenses charged against him, and authorized the issue of a warrant for his arrest; and it was not necessary for the clerk or any other person to make a finding that there was such probable cause. The information alone, verified as it was by the positive oath of Gilbert, was sufficient to show probable cause, and to authorize the clerk to issue the warrant. Crim. Code, § 126. And when the defendant was arrested and arraigned for trial we think the information was sufficient to authorize the court to put him upon his trial.

We now come to a more serious question. Can the defendant be convicted of an offense of which the complaining witness, at the time when he verified the information, had no knowledge or notice, and concerning which he had never had a thought? Upon sound legal principles, and in all common fairness, it would seem that he should not. If he should be convicted under such circumstances, he would be convicted of an offense not intended to be charged against him, and really not charged. It is true that he would be convicted of an offense of a similar character to the one charged against him, but he would not be convicted of the exact and identical offense charged. When the complaining witness verifies an information, he must do so positively, and in such a manner as to indicate that he had actual knowledge of the facts to which he makes oath; and this he does, among other things, for the purpose that a warrant may be issued against the defendant for his arrest, (*State v. Gleason*, 32 Kan. 245; S. C. 4 PAC. REP. 363;) and it must be presumed, in the absence of anything to the contrary, that he has such actual knowledge. It cannot be supposed that he makes oath to an offense of which he has no knowledge or thought. Indeed, it has often been held by courts that where a person makes oath to a thing concerning which he has no knowledge, and where he does not know whether his statements concerning the thing are true or not, he commits perjury, although his statements may, in fact, be true. 2 Bish. Crim. Law, § 1048; 2 Whart. Crim. Law, § 1247. Besides, as the defendant, in this class of cases and in this state, may be convicted of selling any kind of liquor out of the entire catalogue of intoxicating liquors, although not one of such liquors is specifically mentioned in the information, and may be convicted of selling the same to any living person, although no person's name is given, and may be convicted of selling the same at any time within two years next preceding the filing of the information, whether any particular time is mentioned in the information or not, the defendant ought to have some other means of identifying the offense of which he is charged, and some means for preparing for his defense; and if he cannot feel assured that he is to be tried only for some offense of which the complaining witness has knowledge, and for some offense intended at the time of the filing of the information to be charged against him, then surely he has no such means.

nor any reasonable means, of preparing for his defense. In all fairness to him, it would seem that the state should not be allowed to prove any offense except some offense which the complaining witness had in contemplation when he swore to the information.

Any other rule would permit a defendant to be charged in a very vague and indefinite manner with the commission of a single offense, to be tried for a hundred or more, to be required to prepare his defense for all, and be then convicted of an offense of which, at the commencement of the trial, he had no thought, and for which he had made no preparation for defense, and be convicted of an offense to which he either would have made a successful defense or would have pleaded guilty, and have saved all the costs and expenses of the prosecution, if he had only had some sufficient or proper notice. We know of no decided case squarely in point on either side of this question; but there are cases upon analogous questions which have some application. Some of such cases are those which hold that where a grand jury finds an indictment against a defendant and alleges the offense with reference to some person unknown to the grand jury, the defendant can be convicted only of an offense concerning some person who was in fact unknown to the grand jury, and whose name had not been disclosed to them. 1 Bish. Crim. Proc. §§ 546-553; Whart. Crim. Ev. § 97; 2 Whart. Crim. Law, § 1511.

The constitution of the state of Kansas provides, among other things, that "in all prosecutions the accused shall be allowed to appear and defend, in person or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face; and to have compulsory process to compel the attendance of witnesses in his behalf." Const. Bill of Rights, § 10. "And no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person or property to be seized." Const. Bill of Rights, § 15. Now, if a defendant may be prosecuted for selling intoxicating liquors contrary to law, without setting forth any statement of the kind of intoxicating liquors sold, or when he sold the same, or to whom he sold the same, and for an offense of which the complaining witness had no knowledge or thought when he verified the information by his oath, it would seem that these provisions of the constitution would be of but little benefit. And in cases like the present, where the entire prosecution is based and founded upon the oath of the complaining witness, his knowledge of the offense is more important than the knowledge of prosecuting witnesses usually is. The principles running through the foregoing cases, and through all the decided cases that have any application to this case, and the principles embodied in the constitutional bill of rights, are that an accused person must be given a fair notice of the exact offense charged against him; that, when tried, he must be tried for that offense only, and not for some other offense not charged; and that the charge, with its accompanying circumstances,

must not be so uncertain and misleading as to beguile him into the belief that he is to be tried for one offense, when, in fact, he may be tried for another.

In the present case, when the complaining witness verified the information, he had in contemplation at least four different offenses, of all of which, presumably, he had knowledge; but the defendant was not convicted of any one of such offenses, but was convicted of still another offense, and of an offense concerning which the complaining witness did not have the slightest thought or information. We think the prosecution should have been confined to the offenses which were in the mind of the complaining witness when he verified the information. If he had only four offenses in contemplation at that time, the state should have been confined to those four,—one under each count of the information. If, however, he had in contemplation a larger number, then the state should have been required to elect at the proper time as to which of the offenses and under which counts it would rely for a conviction. If the complaining witness had in contemplation 50 or 100 or more violations of law, as possibly he had, the prosecution should at the proper time have selected some four of them, and relied upon these four for a conviction, and not have selected some supposed offense of which the complaining witness had no knowledge or thought.

We think the court below erred in permitting the defendant to be convicted of an offense which was not contemplated at the time of the filing of the information. This error pervades the entire case,—the introduction of the evidence, the instructions to the jury, the verdict and sentence, and the order of the court overruling the defendant's motion for a new trial. Both Gilbert and Dwindle were witnesses in this case; and it was shown beyond all controversy that Gilbert, the complaining witness, had no knowledge or thought, at the time of or prior to his verifying the information, of the offense of which the defendant was found guilty. We also think that the court below erred in rendering judgment for costs. On three of the counts of the information the defendant was acquitted; and upon these three counts he should not have been required to pay costs, but should have recovered costs.

The judgment of the court below will be reversed, and cause remanded for a new trial.

(All the justices concurring.)

(33 Kan. 718)

STATE v. PFEFFERLE and another.

Filed July 9, 1885.

INTOXICATING LIQUORS—ENFORCING LIEN FOR FINE AND COSTS—STATUTE OF LIMITATIONS.

A civil action brought by a county attorney in the name of the state under the provisions of section 18, c. 128, Laws 1881, to enforce a lien for fines and costs upon real estate against the owner of premises who has knowingly suffered a person to sell liquor thereon in violation of law, comes within subdivision 2, § 18, of the Code, being an action upon a liability created by statute, and is not barred by the fourth subdivision of said section 18.

Error from Lyon county.

An information was filed in the district court of Lyon county on August 6, 1883, alleging in the third count thereof that one Lewis Macke unlawfully sold intoxicating liquors on August 5, 1883, in a certain building on lot 130 on Commercial street, in the city of Emporia. Macke was tried and convicted on said third count at the September term of the court for 1883, and fined \$250, and costs taxed at \$108.25, no part of which has ever been paid. He was also sentenced to stand committed in the county jail of Lyon county until the fine and costs were paid in full. On February 27, 1885, the state of Kansas filed its petition setting forth the above and foregoing facts, and averring that Louisa R. Pfefferle and O. Pfefferle, who owned the premises where the intoxicating liquors were sold, knowingly suffered and permitted Lewis Macke to sell liquor thereat in violation of law. The prayer of the petition was as follows:

"Wherefore, plaintiff prays that its said judgment and lien against said lot No. 130 on Commercial street, in said city of Emporia, Lyon county, Kansas, for said sum of \$353.25, and interest thereon at the rate of 7 per cent. per annum from October 1, 1883, be adjudged to be a lien on said lot, and be foreclosed and enforced, and that the said lot be sold to pay and satisfy the said sum, and interest thereon, together with the costs of this action; for which said costs plaintiff prays judgment, and for all other further proper and equitable relief.

"J. W. FEIGHAN, County Attorney of Lyon County, Kansas, and J. JAY BUCK, Attorneys for Plaintiff."

On March 25, 1885, the defendants filed their demurrer as follows, omitting court and title:

"Come now the defendants above named, and demur to the petition of the plaintiff, upon the ground and for the reason that said petition does not state facts sufficient to constitute a cause of action in favor of said plaintiff, and against the defendants.

KELLOGG & SEDGWICK,

"Attorneys for Defendants."

At the March term of the court for 1885, the cause came on for hearing upon the demurrer, which was by the court sustained, plaintiff excepting. The plaintiff electing to stand upon its petition, the court dismissed the action; to which ruling and judgment the plaintiff also excepted, and brings the case here.

J. W. Feighan and J. Jay Buck, for plaintiff in error.

Kellogg & Sedgwick, for defendants in error.

HORTON, C. J. The first question presented is whether the action was barred by the statute of limitations at the time it was commenced. The fine and costs were adjudged against Macke on October 1, 1883, and the petition was filed to enforce the payment of the fine and costs against the property of the defendants on February 27, 1885, more than a year after the judgment rendered against Macke. It is said the district court held that the action was barred by the fourth subdivision of section 18 of the Code, which reads as follows:

"Within one year: An action for libel, slander, assault, battery, malicious prosecution, or false imprisonment; an action upon a statute for a penalty or forfeiture, except where the statute imposing it prescribes a different limitation."

On the part of the plaintiff it is contended that the action comes within either the second or sixth subdivision of section 18. They are:

"(2) Within three years: An action upon contract, not in writing, express or implied; an action upon a liability created by statute, other than a forfeiture or penalty." "(6) An action for relief, not hereinbefore provided for, can only be brought within five years after the cause of action shall have accrued."

We do not think the action is one for penalty or forfeiture. It is, in fact, upon a liability created by statute, and therefore within the terms of subdivision 2. The action is to enforce a lien for the fine and costs which have accrued to the state. "The fine and costs are not imposed upon the owner of the premises, but are imposed upon the person who violates the law, and the owner of the premises is simply made a surety for their payment." *Hardten v. State*, 32 Kan. 637; S. C. 5 PAC. REP. 212.

It is insisted, however, on the part of the defendants, that the petition is fatally defective upon its face because it does not show that Macke was actually committed to the jail of the county. It is doubtful if this question is in the case. The petition recites that the district court found Macke guilty upon the verdict rendered by the jury, and sentenced him to pay a fine of \$250 and all of the costs of the prosecution, taxed at \$103.25, "and that he stand committed to the county jail of Lyon county until the fine and costs are paid in full."

The petition further recites that the judgment and sentence against Macke have "neither been paid, appealed from, modified, satisfied, nor reversed." We may therefore presume that the sentence was carried into effect, and that the defendant was actually committed to the jail of Lyon county. If this were not the case, we are not satisfied with the interpretation given to the proviso of said section 18 by the counsel of defendants. We think said proviso is to be construed in harmony with the entire section, and that it was the purpose of the legislature, in adding the proviso to the section, to prevent thereby the person who violates the law from being relieved or discharged from commitment on account of the fine and costs being made a lien

upon the real estate of the person knowingly suffering and permitting him to sell liquor thereon in violation of law.

It must be apparent, upon a careful consideration, that this view is the proper one, otherwise the lien for the fine and costs upon the real estate would be postponed until a future and indefinite date. The action to enforce the lien may be commenced any time after the judgment, but within the time prescribed in said subdivision 2. *Hardten v. State, supra.*

The order and judgment of the district court will be reversed, and the cause remanded.

(All the justices concurring.)

(34 Kan. 57)

BLISS v. VEDDER.

Filed July 9, 1885.

1. EXEMPT PROPERTY — PRINTING-PRESS AND MATERIAL USED IN PUBLISHING NEWSPAPER.

A printing-press and printing materials used in printing and publishing a weekly newspaper may be exempt from execution under subdivision 8, § 3, exemption laws, and under the facts of this case are exempt.

2. SAME—USE BY EMPLOYEES.

Where the owner of a printing-press and printing materials resides in Kansas, is a married man and the head of a family, and uses such printing-press and printing materials for the purpose of editing and publishing a newspaper, and they are necessary therefor; and the editing and publishing of such newspaper is his principal business, and the business from which he derives his principal support; and in editing and publishing such newspaper he personally arranges the matter and forms therefor, and performs such other work as is usually performed by the foreman of a weekly newspaper; but, not being a practical printer, the most of the work is done through the agency of employes; and he is a partner in two other kinds of business, and is also a justice of the peace: *held*, that the property is, nevertheless, exempt from execution, although it is not exclusively used by the owner in person, and although he may have an interest in other kinds of business.

Error from Washington county.

J. W. Rector and *W. P. Mudgett*, for plaintiff in error.

J. G. Lowe, for defendant in error.

VALENTINE, J. This was an action of replevin brought by *J. W. Bliss* against *James S. Vedder* to recover certain personal property hereafter mentioned. The case was tried before the court without a jury upon an agreed statement of facts. It appears from this agreed statement of facts that on December 19, 1882, the defendant, as constable, held an execution issued on an ordinary judgment for debt against the plaintiff, and then levied the same on one Washington Hoe printing-press, and certain type and other articles used in connection with the press in printing a weekly newspaper in Washington county, Kansas; that the plaintiff at and prior to that time was, and ever since has been, a resident of Kansas, a married man, and the head of a family; that he was then engaged in the business of editing and publishing said newspaper, and was also engaged in carrying

on a job printing-press in Washington in partnership with one Crosby, and was also in partnership with one Mudgett in the loan, land, and insurance business, and was also a justice of the peace; but that the publishing of said newspaper was his main, chief, and principal business, from which he derived his principal support; that all the property so levied on was then used in and about the publishing of said newspaper, and was necessary for that purpose; that the plaintiff was not a practical printer, and used said property through the agency of his employes, except that he himself edited the newspaper, and made up the same, and arranged the matter and forms for the same, and did the work on the same usually done by the foreman of a weekly country newspaper; that said property then belonged to the plaintiff; that after it was levied on, and before the plaintiff began this action, he demanded the property of the defendant as being exempt from seizure, which demand was refused, and the plaintiff then brought this action of replevin, and took and retained the property on an order of delivery. Upon these facts the court below held that the property was not exempt, and rendered judgment in favor of the defendant and against the plaintiff in the alternative for a return of the property, or for \$78.95, the value of the property, and for costs, and the plaintiff brings the case to this court for review. Counsel for the defendant state the question for consideration in this court as follows:

"The one and the only question for your consideration is as to whether a printing-press and other materials used in the publishing of a weekly newspaper come within the provisions of subdivision 8 of section 3 of our exemption law, when the owner of the same is not an operative, not a tradesman, not a 'practical printer,' but uses the same only by and through his employes; and this, too, in view of the fact that he is engaged at the same time in three other and distinct branches of business."

The exemptions provided for by said subdivision 8, § 3,¹ exemption laws, are as follows:

"*Eighth.* The necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and, in addition thereto, stock in trade not exceeding \$400 in value."

The defendant claims that the printing-press and other materials levied on in this case are not exempt from execution, for the reasons that they are not tools or implements at all, or, if tools or implements, then that they are not the kind of tools or implements contemplated by the exemption laws; that the plaintiff is not a mechanic or miner, or other like person,—not even a printer,—but is a professional man and an editor of a newspaper; that the articles in controversy are not used or kept for the purpose of carrying on the plaintiff's trade or business as a professional man or editor, but are used and kept for printing a newspaper; and that the articles in controversy are not used or operated exclusively by the plaintiff, but are used and operated partially, at least, if not wholly, by employes.

¹Comp. Laws 1879, c. 33.

We think the articles are exempt. It does not appear that any of them are costly or complicated machinery, or such that they cannot be easily used or operated by hand; even if being costly or complicated, or not easily used or operated by hand, would take them out of the exemption laws. From the judgment rendered in the case it seems that the value of the property, in the aggregate, is only \$78.95, and there is no pretense anywhere that it is worth more than \$492. We think the articles in controversy are tools and implements, within the meaning of the exemption laws. *Sallee v. Waters*, 17 Ala. 482; *Prather v. Bobo*, 15 La. Ann. 524; *Patten v. Smith*, 4 Conn. 450. See, also, in this connection, *Jenkins v. McNall*, 27 Kan. 532, 533; *Bequillard v. Bartlett*, 19 Kan. 382; *Voorhees v. Patterson*, 20 Kan. 555; *Davidson v. Sechrist*, 28 Kan. 324; *Healy v. Buteman*, 2 R. I. 454. And the plaintiff is not a mere editor of a newspaper; he is also the publisher thereof; and the manual labor of publishing the same is not all done by employes, but he performs a considerable portion of the work himself; and the fact that the plaintiff performs some of the work by and through the agency of employes does not prevent the exemption laws from applying to the property and rendering the same exempt from execution. *Howard v. Williams*, 19 Mass. 80; *Dowling v. Clark*, 85 Mass. 570; *Rayner v. Whicher*, 88 Mass. 292; *Dowling v. Clark*, 83 Mass. 283.

Upon the claim of the defendant that printing-presses and printing materials are not exempt from execution, he cites the following cases, among others: *Buckingham v. Billings*, 13 Mass. 82; *Danforth v. Woodward*, 27 Mass. 423; *Spooner v. Fletcher*, 3 Vt. 133. These cases seem to hold that printing-presses and printing materials are not "tools" within the meaning of their exemption statutes. Now these cases may not be in conflict with the views expressed by us; for these cases relate to tools only, while our statutes relate to "tools and implements;" and the statutes of Massachusetts and Vermont may, in other respects, differ very materially from ours. But if these cases do conflict with the views we have expressed, then we must say that we cannot follow them. We have examined all the other cases cited by counsel. The principal authorities will be found cited in *Thomp. Homest. & Ex. §§ 755 et seq.*, and *Freem. Ex. 266 et seq.* The decisions are as diverse as are the statutes upon which they are founded.

The judgment of the court below will be reversed and cause remanded, with the order that judgment be rendered in favor of the plaintiff and against the defendant for the property in controversy, and for costs.

(All the justices concurring.)

(34 Kan. 13)

MILLER v. NOYES.

Filed July 9, 1885.

GARNISHMENT—ERROR FROM RULING OF JUSTICE OF THE PEACE.

Error does not lie to the district court from a ruling of a justice of the peace refusing to vacate and discharge a process in garnishment. VALENTINE, J., concurring. HORTON, C. J., dissenting to the taxing of costs against the defendant in error.

Error from Doniphan county.

B. A. Seaver, for plaintiff in error.

A. S. Brewster, for defendant in error.

JOHNSTON, J. A. H. Miller instituted this proceeding in error to reverse a judgment of the district court affirming an order made by a justice of the peace. It appears that C. W. Noyes sued A. H. Miller before a justice of the peace of Doniphan county to recover upon a promissory note, and at the same time caused process in garnishment to be issued and served upon school-district No. 21, Doniphan county, by which the plaintiff undertook to garnish the wages of A. H. Miller, who was teaching in the public school of that district. At the trial before the justice of the peace the defendant did not contest the right of Noyes to recover upon the promissory note, but did resist the garnishment of his wages as school-teacher, and moved the court to vacate and discharge the garnishment process, upon the grounds—*First*, that the funds garnished were the earnings of the defendant for personal services within three months next preceding the issuing of the garnishee summons, and that such earnings were necessary for the support of his family, who were wholly dependent upon his labor for maintenance; and, *second*, that the wages of teachers in the public schools are not subject to execution, attachment, or garnishment in the hands of the school-district officers having custody of the same.

After hearing testimony offered in behalf of both parties, upon the ground first stated, the justice of the peace denied the motion. An exception to this ruling was taken and allowed, and the defendant prosecuted his petition in error in the district court to review and reverse the order of the justice refusing to vacate the garnishment process. It was there held, as we understand the plaintiff in error, that error does not lie in such a case to the district court; and it was ordered that the judgment of the justice of the peace be affirmed and executed. A. H. Miller, as plaintiff in error, brings the case here for review, and discusses at length the question whether the wages of a school-teacher are exempt from execution when he is the head of a family, and where his earnings are necessary for their support; and also whether a school-district can be garnished for the wages of its teacher. The first question which we meet, and its decision will dispose of the case here, is, does error lie to the district court from an order of the justice of the peace refusing to vacate a garnishment process? We think not. By section 540 of the Code the authority

of the district court to review proceedings before justices of the peace by petition in error is limited, and extends only to judgments and final orders rendered and made by them. It reads as follows: "A judgment rendered, or final order made, by a justice of the peace, or any other tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated, or modified by the district court."

In this case the plaintiff in error did not complain of or attempt to bring up for review the final judgment in the action. He sought to have reviewed only the decision of the justice of the peace denying the motion to vacate and discharge the garnishment process. That ruling is neither a judgment nor a final order, and hence was not reviewable by a proceeding in error. *Mull v. Jones*, 33 Kan. —; S. C. 5 PAC. REP. 388; *Board of Education v. Scoville*, 13 Kan. 32; *Phelps v. Railroad Co.* 28 Kan. 165; *Hottenstein v. Conrad*, 5 Kan. 249; *Kansas R. M. Co. v. Atchison, T. & S. F. R. Co.* 31 Kan. 90; S. C. 1 PAC. REP. 274. The district court was, therefore, without jurisdiction to entertain the proceeding in error, and should have dismissed it. However, instead of dismissing the proceeding, it appears from the record that the court affirmed the judgment of the justice of the peace, and ordered it to be executed, and to this extent there was error.

The judgment of the district court will be reversed, and the cause remanded, with the direction that the proceeding in error be dismissed.

VALENTINE, J., concurs.

HORTON, C. J. I dissent from the judgment taxing costs against the defendant in error. I think the trial court virtually decided the case upon the merits, as this court has, but technically erred in affirming the judgment of the justice of the peace, instead of dismissing the proceeding in error. And therefore I think the error was immaterial, and one not prejudicial to the rights of plaintiff in error.

(34 Kan. 35)

WOODMANSIE v. HOLCOMB.

Filed July 9, 1885.

1. PARTNERSHIP—TRANSFER OF PROPERTY—RIGHTS OF CREDITORS.

As a general rule the simple contract creditors of a partnership have no lien upon the partnership property until it is acquired by process of law; and a *bona fide* transfer of the partnership property while it remains within the control and possession of the firm, made upon sufficient consideration, and with the consent of all the partners, places it beyond the reach of the partnership creditors.

2. SAME—PAYMENT OF INDIVIDUAL DEBTS.

While the partnership remains in existence and in a solvent condition, it may, upon a *bona fide* consideration, all the partners assenting, transfer and appropriate the firm property in payment of the individual debt of one of its members.

Error from Brown county.

James Falloon, for plaintiff in error.

C. W. Johnson and W. D. Webb, for defendant in error.

JOHNSTON, J. This is an action brought by Zephaniah Holcomb, alleging that on or about August 11, 1882, George T. Woodmansie unlawfully seized, carried away, and converted to his own use a stock of groceries owned by the plaintiff, and to his damage in the sum of \$5,200. The defendant in justification claimed that the property was seized by him as constable, under certain writs of attachment duly issued against Holcomb & Lilly, a partnership composed of T. W. Holcomb, a son of the plaintiff, and one H. C. Lilly, and that the goods were subsequently sold upon judgments rendered against said firm in the attachment suits, and the proceeds of the sale applied in satisfaction of such judgments. The plaintiff claimed that he had purchased, and was the owner of, the stock of goods before they were levied upon by the defendant, while the defendant claimed that the consideration of the alleged purchase by the plaintiff consisted mainly of the individual debts of T. W. Holcomb to the plaintiff, and that the transfer was made with the intent to hinder and delay the creditors of Holcomb & Lilly in the collection of their debts. The cause was tried with a jury, and the verdict and judgment were in favor of the plaintiff. The defendant brings the case here for review. The principal question presented and urged by plaintiff in error arises upon the refusal of the court to charge the jury as follows:

"The court instructs the jury that the creditors of partners have a prior right to look to the partnership property for the payment of their debts to the creditors of the individuals composing the partnership. And if any creditor of a member of a partnership should obtain all the partnership property in payment of his claim against the individual member of the partnership, then such sale would be fraudulent as to the partnership creditors; and if in a suit brought against the partnership no property could be found of the firm, or the individuals composing the firm, out of which to satisfy any judgment which might be rendered therein, then such firm creditors could levy execution upon their said judgments on the property so sold to a creditor of an individual member of the firm."

This request contained substantially the proposition that a partnership, however solvent, cannot, in good faith or otherwise, make a sale and transfer the title of partnership effects where the consideration is the payment of the individual indebtedness of a member of the partnership. This proposition cannot be sustained. While it is true, as a general rule, that, as between partners, and also as between firm and individual creditors, the partnership debts have priority over individual debts as against partnership property, yet the simple contract creditors of a partnership have no lien upon its property until it is acquired by process of law. They have what has been termed a *quasi lien*, but this arises and is derived solely through the equitable lien of the partners. Each partner has a right to have the firm assets applied in discharge of the firm liabilities, and to the payment of whatever may be due him when the firm indebtedness is discharged and the partnership closed up.

This equitable claim of the partners may, in many cases, with the

assent of the partners, be made available to the creditors; but as no such claim or equity exists in the creditors, independent of the partners, a *bona fide* transfer of the partnership property, made with the consent of all the partners, places it beyond the reach of the firm creditors. As has been stated, "while the partnership is solvent and going on, the creditors have no equity, strictly speaking, against the effects of the partnership; neither have they any lien on the partnership effects for their debts. All that they can or may do is to proceed by an action at law for their debts against the partners, and, having obtained judgment therein, they may cause the execution issuing upon that judgment to be levied upon the partnership effects, or upon the separate effects of each partner, or upon both. There being then no lien, and no equity in favor of the creditors against the partnership effects, it follows that those effects are susceptible of being legally transferred *bona fide*, for a valuable consideration, to any person whatsoever, and as well to the other partners as to mere strangers." Story, Partn. § 258.

While the partnership remains in existence and is solvent, we think it has the right, with the consent of all its members, and upon *bona fide* consideration, to sell and transfer the firm property in payment of the individual debt of one of the firm. Under such circumstances the transfer could not be held to be a fraud upon the firm creditors. The decisions of the courts have gone further than this, and, although not unanimous, the weight of authority seems to be that mere insolvency, where no actual fraud intervenes, will not deprive the partners of their legal control over the property, and of the right to dispose of the same as they may choose; and where the separate creditor purchases from the firm in good faith, and the individual indebtedness is a fair price for the property purchased, such purchase cannot of itself be held fraudulent as against the general creditors of the firm. *Sigler v. Knox Co. Bank*, 8 Ohio St. 511; *Schmidlapp v. Currie*, 55 Miss. 597; *Case v. Beauregard*, 99 U. S. 119; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 13; *Wilcox v. Kellogg*, 11 Ohio 394; *Gwin v. Sedley*, 5 Ohio St. 96; *Allen v. Center Valley Co.* 21 Conn. 130; *Rice v. Barnard*, 20 Vt. 479; *Haben v. Harshaw*, 49 Wis. 379; S. C. 5 N. W. Rep. 872; *White v. Parish*, 20 Tex. 688; *Schaeffer v. Fithian*, 17 Ind. 463; *McDonald v. Beach*, 2 Blackf. 55; *Ex parte Ruffin*, 6 Ves. 119; *Whitton v. Smith*, 1 Freem. Ch. 231; *Freeman v. Stewart*, 41 Miss. 138; *Potts v. Blackwell*, 4 Jones, Eq. 58. It follows from these considerations that the instruction in the form requested was rightly refused.

Exceptions were also taken to the refusal of the court to give other instructions requested by the defendant, but from an examination of the record it appears that the doctrine contained in these requests was aptly and fully stated by the court in its general charge.

The judgment of the district court will be affirmed.

(All the justices concurring.)

(34 Kan. 22)

KENNEDY v. POWELL.

Filed July 9, 1885.

1. FRAUDULENT CONVEYANCE—PAYMENT OF DEBT DUE WIFE.

A wife who is a *bona fide* creditor of the husband is entitled to security or payment out of her husband's estate, the same as any other creditor; and, although the husband is in failing circumstances, he may in good faith prefer her, to the exclusion of other creditors, by transferring real estate or other property to her, at a fair price, in payment of her debt against him.

2. SAME—PRESUMPTION FROM RELATION OF PARTIES.

As the relationship existing between the parties afforded opportunity to commit fraud, their action in making the transfer should be closely scrutinized to see that it was honest; that the consideration was adequate, and was paid out of her separate estate.

3. SAME—STATUTE OF LIMITATIONS.

A *bona fide* indebtedness may be paid by a husband to his wife, although the statute of limitations may have run against it. He is not compelled to resort to this defense, nor can his other creditors interfere and insist upon it for him.

Error from Montgomery county.

W. T. O'Connor, for plaintiff in error.

Dunkin & Chandler, for defendant in error.

JOHNSTON, J. On December 8, 1883, William Kennedy brought an action in the district court of Montgomery county against William Powell, to recover a judgment for \$2,421.85, and on the same day caused an order of attachment to be issued, upon the grounds that the defendant was a non-resident of the state of Kansas, and that he had assigned and conveyed his property with the intent to defraud, hinder, and delay his creditors. The order of attachment was levied upon lots 2, 3, and 4 of section 31, township 33, range 17 E., in Montgomery county, Kansas, as the property of the plaintiff, the title of which stood in the name of Elizabeth Powell. Afterwards, Elizabeth Powell filed a motion in the district court to vacate and discharge the attachment levied upon the above-described land, upon the ground that she was the owner in fee thereof, and that William Powell had no interest in the same at the time of the levy. The hearing of this motion was had before the judge of the district court at chambers, on July 1, 1884. Upon the trial of the motion it was claimed by Kennedy that Elizabeth Powell was not the *bona fide* owner of the attached land, but that it had been conveyed to her through a trustee, from her husband, at a time when he was insolvent, without consideration, and for the purpose of placing it beyond the reach of and to defraud his creditors. Elizabeth Powell contended, and offered testimony tending to show, that the land was conveyed to her in good faith, for a sufficient consideration, in payment of a *bona fide* debt due from her husband to her, for money which she had received from her father during his life-time, and from his estate after his death, and which had been loaned to her husband and used by him in the purchase of land, and in paying his debts. The finding of the judge was in favor of Elizabeth Powell, holding the conveyance to be *bona fide* and valid, and he therefore vacated and discharged the order of

attachment. A reversal of that order and judgment is sought here by the plaintiff in error.

We think there was testimony sufficient to justify the learned judge in the finding made, and his order and judgment ought not to be disturbed. We will not undertake, nor would it be profitable, to review at length the testimony offered upon the motion, and we need only state that in our opinion it fairly shows that at the time the land in controversy was conveyed to Elizabeth Powell, William Powell was indebted to her, and the amount of the indebtedness was a fair consideration for the land conveyed. That she was a *bona fide* creditor for a considerable sum is not disputed; but it is urged on behalf of the plaintiff in error that the transfer was made when her husband was financially embarrassed, and in failing circumstances, and for that reason, and in consequence of the relationship existing between them, the conveyance should be deemed fraudulent as against his other creditors. It is true that she was aware of his financial embarrassment, but this of itself is not enough to defeat a conveyance. It has been frequently decided that a debtor in failing circumstances may prefer one creditor to another, providing it is done in good faith and for a valuable consideration. *Bailey v. Kansas Manuf'g Co.* 32 Kan. 73; S. C. 3 PAC. REP. 756; *Tootle v. Coldwell*, 30 Kan. 125; S. C. 1 PAC. REP. 329; *Randall v. Shaw*, 28 Kan. 419; *Arn v. Hoersemann*, 26 Kan. 413; *Bishop v. Jones*, 28 Kan. 680.

If the indebtedness of Powell to his wife was a *bona fide* one, as the judge has necessarily found, she is entitled to be considered as her husband's creditor, and has a right to expect and receive security or payment out of his estate the same as any other creditor, and he has a right to prefer her to other creditors by transferring real estate or other property at a fair price in payment of her claim against him. As was said in *Monroe v. May*, 9 Kan. 473: "The right of a debtor to pay one creditor in full before paying another anything is absolute and unquestioned. It is no wrong to the latter. Mrs. Monroe was, so far as this transaction is concerned, her husband's creditor; would have shared with other creditors in the disposition by an assignee of her husband's property; and could rightfully receive payment in full before any others received a cent."

It is true, the relationship existing between the parties to the transaction afforded great opportunity to commit fraud, and their action in making the transfer should be closely scrutinized in order to see that it was honest, and that the consideration was paid out of her separate estate, and not made to withdraw the property from the reach of the creditors of her husband. But the conveyance cannot be overturned by the mere suspicion that may arise by reason of the transfer of the husband to the wife when he was in failing circumstances. To support this transfer, however, there should be a fair and adequate consideration. The sufficiency of the consideration is questioned by the plaintiff in error. There is a conflict of testimony

regarding the value of the land transferred. The valuation placed upon it ranges from \$2,000 to \$3,000. It is appraised in the attachment proceeding at \$2,300, which, under all the testimony, may be regarded as a fair price for it. At the time the land was conveyed to Mrs. Powell there was an incumbrance upon it of \$1,300, and for which she became liable.

In respect to the amount of the indebtedness of Powell to his wife, the testimony offered by her tends to show that there was due to her at the time of the conveyance about \$1,500. This amount is made up of \$120 received from her father and paid to her husband about 1849, and also of several installments received by her from her father's estate from 1877 until 1882, with interest from the time these amounts were received by her husband. Plaintiff in error contends that the money received in 1849 ought not to be considered as a claim against the husband. *First*, for the reason that they were residing in Indiana, and that by the law in force in that state the money derived from her father's estate after marriage instantly became the property of her husband, and no demand could arise in favor of the wife and against the husband thereon. An examination of the record, however, fails to show what the law of Indiana in that respect was, and in the absence of testimony we cannot assume that the law of that state differs from ours. *Furrow v. Chapin*, 13 Kan. 113. The *second* reason urged why this claim should not be treated as an existing indebtedness against the husband, is that it is stale and dormant. This is an objection or defense to be offered, if at all, by the debtor himself. "The mere fact that a claim is old is no reason why it should not be paid. The law allows a man to be honest and to pay an honest debt, however stale and ancient it may be. He may interpose the statute of limitations, but he may waive it also. The law does not compel him to resort to this defense, nor can others insist upon it for him." *Brookville Nat. Bank v. Kimble*, 76 Ind. 195.

Our conclusion, after a careful examination of the record before us, is that the finding of the learned judge is justified by the testimony, and that his order and judgment should be affirmed.

(All the justices concurring.)

(34 Kan. 39)

DEISHER v. STEIN and another.

Filed July 9, 1885.

STATUTE OF FRAUDS—ORAL AGREEMENT TO EXECUTE LEASE.

Where a land-owner enters into a parol agreement with another person to execute to such other person a written lease for the land, for a term of more than one year, and such other person, in pursuance of such agreement, and with the consent of the land-owner, enters into the possession of the land, and expends time, labor, money, and materials in making improvements on the land, and in putting it in a condition to use and enjoy it during the term of his contemplated lease, and afterwards the land-owner refuses to execute the lease, and ousts the contemplated lessee from the premises, *held*, that the parol

agreement is not wholly and entirely void, under the fifth and sixth sections of the statute of frauds, but is so far valid that the contemplated lessee may recover from the land-owner such damages as in justice and equity he should recover; that the taking of the possession of the property, and expending time, labor, money, and materials thereon, to this extent, takes the case out of the statute of frauds.

Error from Shawnee county.

F. G. Hentig, for plaintiff in error.

Hazen & Isenhardt, for defendants in error.

VALENTINE, J. This action was brought by J. R. Deisher against William Stein and Anna Stein, his wife, before a justice of the peace of Shawnee county, Kansas, and after judgment in favor of the plaintiff, and against the defendants, the defendants appealed to the district court, where the plaintiff filed an amended bill of particulars, which reads as follows:

"The plaintiff herein complains of the defendants, and says that on or about the fourth day of June, 1883, the defendants, William Stein and wife, agreed to lease to this plaintiff, for a term of five years from that date, lot No. 118 on East Fourth street, in this city of Topeka, Shawnee county, Kansas, at an annual rent of \$100 per year, and this plaintiff agreed to lease from said defendants said premises at the rate aforesaid; and it was agreed between the plaintiff and defendants that a lease in writing should be executed by and between the parties hereto as above set forth; and plaintiff further says that, relying upon the contract and agreement so made as aforesaid, and with the consent of said defendants, he went into possession of said lot and commenced to build a stone building for the purpose of selling groceries therein; that he made contracts for stone-work and other materials for said buildings, at a great expense and outlay to himself, and spent 21 days' time in getting said material and labor together, and contracts made for the erecting of said building; and plaintiff says that after he had made said contract, and purchased said material, and commenced work on said building, the said defendants stopped this plaintiff in his work and refused to make said lease in writing, and told this plaintiff they would not execute said lease, and then and there refused to comply with their agreement; and thereupon said defendants went into possession of said lot, and have so continued ever since, to the great damage of this plaintiff in time, labor, and money, materials, etc., in the sum of \$100; wherefore, plaintiff prays judgment against said defendants, William Stein and ——— Stein, his wife, for the sum of \$100, and costs of suit."

The defendants demurred to this bill of particulars, upon the ground that it did not state facts sufficient to constitute a cause of action; which demurrer the court sustained, and the plaintiff excepted, and now, as plaintiff in error, brings the case to this court, and assigns for error the sustaining of said demurrer. It would seem from the proceedings in this case that the only contested question involved in the case, either of law or fact, is as follows: Where a land-owner enters into a parol agreement with another person to execute to such other person a written lease for the land for a term of more than one year, and such other person, in pursuance of such agreement, and with the consent of the land-owner, enters into the possession of the land, and expends time, labor, money, and materials in making improvements on the land, and in putting it in a condition to use and

enjoy it during the term of his contemplated lease, and afterwards the land-owner refuses to execute the lease and ousts the contemplated lessee from the premises, is the parol agreement wholly and entirely void under the fifth and sixth sections of the statute of frauds, or is it so far valid that the contemplated lessee may recover from the land-owner such damages as in justice and equity he should recover?

It must be remembered that in Kansas all the old forms of action, and all distinctions between actions at law and suits in equity, are abolished, and in their stead only one form of action is recognized, called a civil action; and in this form of action all that a plaintiff need to do, in stating his cause of action, is to state the facts of his case, and if such facts would entitle him to recover in any form of action, either at law or in equity, he will be entitled to recover under such statement. It must also be remembered that this action was commenced before a justice of the peace, and in justices' courts parties are not required to state the facts of their cases with that same degree of precision, exactness, fullness, and circumstantial detail that they are required to state them in cases brought in the district court.

After these preliminary statements we would state that we think the plaintiff's bill of particulars states a good cause of action. Of course the parol agreement set forth in such bill of particulars was void in its inception, and would have remained void if the parties had done nothing to take the case out of the statute of frauds; but the statute of frauds was enacted to prevent fraud, and it cannot be invoked for the purpose of enabling parties to commit fraud. When the plaintiff, with the consent of the defendants, and in pursuance of the parol agreement, took possession of the property, and expended time, labor, money, and materials thereon, for the purpose of placing it in a condition for use under the contemplated lease, the case was taken out of the statute of frauds to such an extent that the plaintiff is not to lose what he expended under the parol agreement between himself and the defendants. *Driggs v. Dwight*, 17 Wend. 71; *Ryan v. Dox*, 34 N. Y. 307; *Harris v. Frink*, 49 N. Y. 24; *Grant v. Ramsey*, 7 Ohio St. 157; *Bard v. Elston*, 31 Kan. 274; S. C. 1 PAC. REP. 565; *Becker v. Mason*, 30 Kan. 703; S. C. 2 PAC. REP. 850; *Tayl. Landl. & Ten. c. 1, § 2, par. 32*; 2 Reed, St. Frauds, 582.

Of course the case should not be taken out of the statute of frauds any further than is necessary to do justice and to prevent fraud; and to pay the plaintiff a fair compensation for what he has lost by reason of the parol agreement between the parties is probably sufficient for that purpose. We think, under our practice and procedure, the authorities cited by the defendants are not applicable. In the most of them the facts differ materially from the facts of this case, and in others it is simply stated that the plaintiff, under the circumstances, has no action at law, although he may have in equity.

The judgment of the court below will be reversed and cause re-

manded, with the order that the demurrer to the plaintiff's bill of particulars be overruled.

(All the justices concurring.)

(33 Kan. 748)

PRICKETT v. ATCHISON, T. & S. F. R. Co.

Filed July 9, 1885.

1. RAILROAD COMPANIES—FENCING AND CATTLE-GUARDS—WHEN DISPENSED WITH.

Public necessity requires that railroad depots, and so much of the adjoining grounds and sidetracks as are reasonably necessary for the business of the public with the railroad company at the depot, should be free of access and unobstructed by fences and cattle-guards; and where fences or cattle-guards would interfere with the public convenience, or would hinder or prevent the railroad company from properly serving the public, the statute requiring the fencing of railroads will, to that extent, be inapplicable.

2. SAME—PRIVATE INTEREST OR CONVENIENCE.

But no private interest, convenience, or inconvenience on the part of the railroad company will alone be sufficient to absolve it from fencing its road, where the statute in express terms requires that the road shall be fenced. *Atchison, T. & S. F. R. Co. v. Shaft*, 33 Kan. —; S. C. 6 PAC. REP. 908.

3. SAME—STOCK KILLED WHILE RUNNING AT LARGE.

Where stock running at large go upon the railroad track and are killed by a passing train at a point where the railroad company is not required to fence its road, the company is held to the exercise of reasonable care, and is liable for ordinary negligence. The mere fact that the plaintiff in this case permitted his cow to run at large does not constitute such negligence as will defeat a recovery.

Error from Chase county.

Madden Bros., for plaintiff in error.

A. A. Hurd, C. N. Sterry, and Robert Dunlap, for defendant in error.

JOHNSTON, J. This action was brought by U. O. Prickett to recover the value of his cow, which was killed by a passing freight train of the defendant near to the railroad station at Elmdale. The cow was struck and killed not far from the end of the siding, which is used in connection with the station, and is about 2,000 feet long. The plaintiff alleged that the cow was killed through the negligence of the defendant in operating its train, and also in failing to inclose its track with a lawful fence. The jury returned a verdict in favor of the railroad company, and the plaintiff is here alleging error. The principal objection made is against the charge of the court. The fifth instruction was as follows:

"If you should find from all the evidence in this case that the defendant had a station at Elmdale at the time this cow was killed, which was used by the public as a railroad station for receiving and sending away freight, and for getting on and off defendant's trains, and that it was necessary for defendant's business with the public that the defendant should have a side track at such station, and that it did have a side track at such station at said time, and that this side track at such station was crossed by one or more public roads which the public traveled over; and if you should further find that such side track was not longer than it was necessary for it to be on account of the business transacted at said station by the defendant; and if you should further

find that no portion of said side track could be inclosed by a fence without cattle-guards being built across such side track; and if you should further find that, owing to the character of the business done at said station by the defendant on such side track, that cattle-guards could not be built across any part of such side track without endangering the lives or limbs of such of defendant's employes as might, from time to time, be required to use such side track in the operation of defendant's trains and cars thereon,—then, and in such case, you are instructed that defendant was not required to inclose said side track, or any portion of it, with a fence, even although such side track might occupy in length a greater strip of land than would be reasonably necessary for the use of defendant as station grounds; and you are further instructed that, in such case, if the plaintiff's cow was killed at such station within the limits occupied by such side track, that then, and in such case, the plaintiff cannot recover in this action because of any failure of the defendant to inclose such side track with a lawful fence."

The exemption stated in the latter part of the instruction, relieving the railroad company from fencing the track, is too broad, and cannot be upheld. The statute imposing upon railroad companies the duty of fencing their tracks in terms contains no exceptions. There is therefore no exemption from the duty imposed by the terms of the statute, except such as may arise by implication from public necessity, or the superior obligation of the railroad company to the public under other statutes. *Railroad Co. v. Jones*, 20 Kan. 527; *Union Pac. Ry. Co. v. Dyche*, 28 Kan. 202; *Atchison, T. & S. F. R. Co. v. Shaft*, 33 Kan. —; S. C. 6 PAC. REP. 908. In the latter case Mr. Justice VALENTINE stated the rule under the authorities to be—

"That railroads are not absolved from complying with the express terms of the statute requiring them to inclose their roads with good and lawful fences, except where some paramount interest of the public intervenes, or some paramount obligation or duty to the public rests upon the railroad companies rendering it improper for them to fence their roads."

It has accordingly been held by most of the courts where the question has been raised that public necessity requires that depots or stations should be unfenced. It would seem, too, that so much of the grounds and side tracks connected with the depot as are reasonably necessary for the business of the public with the railroad company at the station should be free of access and unobstructed by fences or cattle-guards. And therefore where fences and cattle-guards would interfere with the public convenience, or would hinder or prevent the railroad company from properly serving the public, the statute requiring the fencing of railroads will, to that extent, be inapplicable. See the numerous cases cited upon this point in the case of *Atchison, T. & S. F. R. Co. v. Shaft*, *supra*. But in the instruction quoted the judge of the district court did not limit the exemption to public necessity or convenience. His decision would relieve the company from fencing the track where the fences would interfere with the interest or convenience of the company. And it further implies that a greater quantity of land than is necessary in the transaction of its business with the public may be left unfenced.

This ruling is in conflict with the views herein expressed, and with the decision of the court in the case of *Atchison, T. & S. F. R. Co. v. Shaft*, *supra*, and must be held erroneous.

Another objection is made by the plaintiff to that part of the charge of the court in which the jury were instructed that if the cow went upon the track and was killed, at a point where the railroad track is not required to be fenced, they could not find for the plaintiff, unless there was gross negligence on the part of the defendant, or its employes, which resulted in the killing of the cow. This was error. It is true, the plaintiff in this case permitted his cow to run at large, but under the circumstances stated, and within the decisions of this court, the railroad company is held to the exercise of reasonable care, and is liable for ordinary negligence, and the mere fact that the plaintiff permitted his stock to run at large does not constitute such negligence as will defeat a recovery. *Atchison, T. & S. F. R. Co. v. Shaft*, *supra*; *Missouri Pac. Ry. Co. v. Wilson*, 28 Kan. 637; *St. Joseph & D. C. R. Co. v. Grover*, 11 Kan. 302; *Smith v. Chicago, R. I. & P. R. Co.* 34 Iowa, 506; *Davis v. Burlington & M. R. Co.* 26 Iowa, 549; *Flint & P. M. Ry. Co. v. Lull*, 28 Mich. 511; *Ewing v. Chicago & A. R. Co.* 72 Ill. 25; *Bellefontaine Ry. Co. v. Reed*, 33 Ind. 476; *Kerwhaker v. Cleveland, C. & C. R. Co.* 3 Ohio St. 172; *Cressly v. Northern R. Corp.* 15 Amer. & Eng. R. Cas. 540, and note, 544.

No reversible error is seen in the rulings of the court upon the admission of testimony, but on account of the errors pointed out the judgment of the district court must be reversed, and the cause remanded for a new trial.

(All the justices concurring.)

(34 Kan. 46)

PILCHER v. ATCHISON, T. & S. F. R. Co.

Filed July 9, 1885.

EVIDENCE—INTRODUCTION OF COPY OF WRITING.

It is error to permit a copy of a written contract, or written conveyance, to be introduced in evidence, over the objection and exception of the adverse party, where it is not shown that the original has ever been delivered so as to make it a contract or conveyance, or that the original has been lost or destroyed, or placed beyond the reach of the party offering to introduce the copy in evidence and the party in whose possession the original should be if it had ever been delivered.

Error from Johnson county.

J. W. Parker, J. P. Hindman, and E. B. Gill, for plaintiff in error.
A. A. Hurd and F. R. Ogg, for defendant in error.

VALENTINE, J. This was an action in the nature of ejectment brought by Lucinda Pilcher in the district court of Johnson county against the Atchison, Topeka & Santa Fe Railroad Company, to recover certain real estate occupied by the railroad company as a portion of its right of way and for depot purposes. It appears that the land formerly belonged to Thomas Pilcher; that in 1871, and during

his life-time, the St. Louis, Lawrence & Denver Railroad Company took possession of the same; and that the present defendant is the successor in interest of said St. Louis, Lawrence & Denver Railroad Company. It also appears that in 1879 Pilcher died, leaving the present plaintiff as his widow and successor in interest, having devised the property to her by will. There is no claim in this case that the railroad company ever procured any interest in the property by virtue of any condemnation proceedings; but it is claimed that the railroad company procured such interest by virtue of a contract of some kind, made with Thomas Pilcher during his life-time. The case was tried before the court without a jury, and the plaintiff, by proper evidence, made out a *prima facie* case for the recovery of the property, and then rested; and the defendant, in order to make out its defense, then introduced in evidence, with the permission of the court, but over the objection and exception of the plaintiff, a copy of a supposed written contract, or rather conveyance, claimed to have been executed by Thomas Pilcher in his life-time.

It appeared that Thomas Pilcher, in his life-time, and about March 1, 1871, drew up a paper, which, in substance, was a conveyance, with certain conditions, from himself to the railroad company of an easement in the land for right of way and for depot purposes; and hesigned the same, but it was never acknowledged; and he handed it to his son to be copied, and his son made a copy thereof and handed the original back to his father. What then became of either the original or the copy is not shown, except that the copy was introduced in evidence on the trial of this case. There is no evidence that the original was ever delivered to the railroad company, or that the railroad company ever saw it, or that any person has ever seen it since it was returned by the son to the father, nor is there any evidence that the father ever saw the copy. The copy seems to have been retained by the son. It is this copy which was introduced in evidence on the trial of this case by the railroad company, and it was there identified by the son.

We think the court below erred in permitting the railroad company to introduce this copy in evidence. The original was probably never delivered to the railroad company, or to any one for the company, and therefore never had any force as a contract or conveyance. But even if the original was ever delivered, still no one knows how many changes or alterations were made in the same before it was delivered. But, under any circumstances, the original itself should have been introduced in evidence, and not merely a copy; or at least, before a mere copy was introduced, it should have been shown that the original was either lost or destroyed, or placed beyond the reach of the railroad company, which certainly was not done if the original had ever been delivered to the railroad company. It is probable that some kind of parol contract was entered into between the railroad company and Thomas Pilcher, but the railroad company did not at-

tempt to prove any such parol contract. The company seemed to rely upon the supposed written conveyance of which the copy introduced in evidence was claimed to be an exact copy. So far as it appears from the record of this case, the copy introduced in evidence was so introduced as a copy of the written contract or written conveyance, which it purported to be, and for the purpose of proving such written contract or written conveyance, and was not introduced merely for the purpose of showing an admission of the terms of some supposed or alleged parol contract previously or subsequently entered into between the parties.

We do not intend in this case to determine what the ultimate rights of the parties are, or even to express any opinion thereon. It is possible, though we think it is not probable, that a written conveyance similar to the copy introduced in evidence, and relied on by the railroad company in this case, was executed by Pilcher and delivered to the railroad company; and it is highly probable that the railroad company and Pilcher entered into a parol contract corresponding in its terms to the written conveyance evidenced by the copy introduced in evidence; and it is possible that by the parol contract, together with what was afterwards done by the railroad company, and suffered to be done by Pilcher and wife, the railroad company procured a valid easement in and to the property in controversy,—but at this present time we do not wish to express any opinion thereon.

For the error in permitting said evidence to be introduced the judgment of the court below will be reversed, and cause remanded for a new trial.

(All the justices concurring.)

(33 Kan. 721)

DOYLE and others v. DOYLE.

Filed July 9, 1885.

1. STATUTE OF LIMITATIONS—ACTION TO CANCEL TAX DEED.

In an action to cancel and set aside a tax deed the plaintiff alleged that one of the defendants, in consideration of the occupation and use of the plaintiff's land, undertook to pay all taxes that might be levied against it, but that, for the purpose of wrongfully depriving the plaintiff of her ownership in the land, and acquiring title in himself, he failed to pay the taxes levied thereon, permitted the land to be sold at tax sale, and caused certificates of sale and tax deeds thereon to be issued and executed in the name of his brother, who was a party to the wrong, and is one of the defendants. *Held*, that the plaintiff's right of recovery is founded and depends upon the fraud of the defendants, and that the limitation in subdivision 3 of section 18 of the Code, providing that actions for relief upon the ground of fraud must be brought within two years after the discovery of the fraud, is applicable.

2. SAME—PLEADING FRAUD—TIME.

Where the plaintiff alleges that the fraud was consummated more than two years prior to the commencement of the action, but fails to state when the fraud was actually discovered, the petition will be held defective on demurrer. *Young v. Whittenhall*, 15 Kan. 579.

Error from Davis county.

McClure & Austin, for plaintiffs in error.

Ketner & Humphrey, for defendant in error.

JOHNSTON, J. Mary Doyle brought an action against her husband, P. A. Doyle, and his brother, Philip Doyle, in the district court of Davis county, and in her petition alleged, substantially, that for many years she had been the owner, and in the continuous possession, of two tracts of land in Davis county. Her husband resided with her upon the land, and, in consideration of the use and occupation of the same, he undertook to pay all taxes levied against it; but for the purpose, and with the intent to defraud her and acquire title to the land in himself, he purposely neglected to discharge the taxes on the land for the year 1874, and permitted it to be sold at tax sale for taxes; that thereafter he paid the delinquent taxes, together with the interest and costs which had accrued, and caused certificates of sale to be executed in the name of Philip Doyle, his brother; that on September 10, 1878, P. A. Doyle, neglecting to redeem the land from tax sale, and in pursuance of a design and purpose on the part of the defendants to wrongfully deprive the plaintiff of her right, title, and ownership in and to said lands, caused two tax deeds to be executed to the county clerk of Davis county, in the name of said Philip Doyle, but secretly in trust for P. A. Doyle. These tax deeds were recorded on September 21, 1878, and copies of the same are set forth in the plaintiff's petition. She further alleges that she had no knowledge of the sale of the land for taxes, nor that tax deeds had been executed, until long after such proceedings were had and completed. She therefore asked that the tax sales be declared illegal and void, and that the tax deeds be canceled and held for naught.

To this petition the defendants filed a demurrer, and contended that the petition sets up an action for relief on the ground of fraud, and is barred by the two years statute of limitations. Another ground of demurrer asserted by the defendants is that as the suit is against the tax purchaser to avoid a tax deed that has been recorded more than five years prior to the commencement of this action, the right to maintain the action has been cut off by the limitation provided in section 141 of the tax law.

The plaintiff's action, we think, clearly comes within the two years limitation. She bases her right to relief upon the wrongful design and action of the defendants. In terms, she charges fraud upon the part of both of the defendants, claiming that they were acting in collusion to wrongfully wrest from her the title and ownership of her land. It is charged that P. A. Doyle, who was legally bound to pay the taxes levied against the land, violated his trust and betrayed the plaintiff by purposely failing to pay the taxes and concealing his neglect from her, and that the taking of the tax-sale certificates, and the execution of the tax deeds in the name of Philip Doyle, was all done by the defendants in pursuance of the fraudulent purpose to acquire title to the land in themselves. The acts charged against the

defendants certainly constituted a fraud upon the plaintiff, and if the action is maintainable, and the allegations are proven, it follows that the tax deeds should be held illegal and void.

The essential question to be tried in the case, and the real ground of plaintiff's right to recover, is the fraud of the defendants, and therefore that provision of section 18 of the Code, limiting the time within which actions for relief on the ground of fraud may be brought, must be held to apply. *Main v. Payne*, 17 Kan. 608; *Kennedy v. Kennedy*, 25 Kan. 151; *Duffitt v. Tuhan*, 28 Kan. 292. It is expressly provided in the section of the Code last referred to that a cause of action shall not be deemed to have accrued until the discovery of the fraud. In this case it appears that the fraud was consummated when the deed was obtained and recorded; but, while the deed may be and probably is regular upon its face, yet, having been fraudulently acquired, it will not of itself divest the original owner of her interest in the land, neither will it start the statute of limitations relating to tax titles to running. *Duffitt v. Tuhan*, *supra*; *Carithers v. Weaver*, 7 Kan. 110. Nor will the recording of these tax deeds operate as a notice to the plaintiff of the defendants' fraud. In such a case there is no constructive discovery. It has been held that "if an agent or tenant should fraudulently allow the lands of his principal or landlord to be sold for taxes, and take the deed himself and put it on record, this would not be notice to the principal or landlord that would set running the statute that would bar him from an action of relief against the fraud." *Duffitt v. Tuhan*, *supra*. See, also, *McMahon v. McGraw*, 26 Wis. 622.

It is contended, however, by the plaintiffs in error that the petition shows the fraudulent action of the defendants to have occurred more than two years prior to the commencement of this suit, but as the plaintiff failed to set forth when the fraud was discovered, or to plead anything which would take the case out of the operation of the statute, the alleged cause of action must be deemed to be barred. The only allegation to be found in the petition in respect to her knowledge of defendants' action, or regarding her discovery of the fraud, is as follows: "Plaintiff further states that she had no knowledge or information in respect to the sale of said lands at said tax sale, or that the same had been sold, or were about to be or had been deeded in pursuance of such sale, until long after such proceedings were had and completed." In this respect the petition must be held insufficient. *Young v. Whittenhall*, 15 Kan. 579, was a case in many respects like the present one, and there the precise point under consideration was determined against the pleader. It was ruled that "where the petition shows upon its face that the fraud upon which the cause of action was founded was consummated more than two years before the commencement of the action, the plaintiff must further set forth in his petition that he did not discover the fraud until within less than two years before the commencement of the action, or his petition

will be held defective on demurrer." From these considerations it follows that the court erred in overruling the defendants' demurrer.

It may be remarked that if we should disregard the allegation of fraud in the petition, and treat the action as one to set aside the tax deeds upon grounds other than fraud, the limitation of five years prescribed in section 141 of the tax law would be an effectual bar against the plaintiff. There it is provided that a suit or proceeding against the tax purchaser, his heirs or assigns, to defeat or avoid a sale and conveyance of land for taxes, shall be commenced within five years from the time of recording the tax deed, and not thereafter. The plaintiff began this action on the ninth day of June, 1884, and, as has been seen, the tax deeds were recorded on September 21, 1878. Under this statute, and within the decisions of this court, the original owner cannot maintain an action or set up any claim for affirmative relief that would in effect defeat and avoid the plaintiff's tax deed. *Walker v. Boh*, 32 Kan. 354; S. C. 4 PAC. REP. 272; *Myers v. Coonradt*, 28 Kan. 211. The limitation of this statute will not, however, prevent the plaintiff from defending her rights in the land when they are attacked by the holder of the tax deed, though in this case it appears that the tax deeds of the defendant Philip Doyle are of little, if any, value. The plaintiff has been in the continuous possession of the land ever since the recording of the tax deeds by Philip Doyle. No action has been brought by him for the recovery of the land, and under subdivision 3 of section 16 of the Code his right of action to recover the lands under his tax deeds has long been barred.

The judgment of the district court overruling the demurrer must be reversed, and the cause remanded.

(All the justices concurring.)

(34 Kan. 29)

DOCKING v. FRAZELL.

Filed July 9, 1885.

1. REAL ESTATE—HOUSE USED AS HOMESTEAD, RESIDENCE, AND HOTEL.

A building situated on real estate and used as the homestead and residence of a family, and also as a hotel, will, in the absence of any evidence or showing to the contrary, be presumed to be real estate.

2. SAME—EXECUTION OF CHATTEL MORTGAGE.

Where a person in the possession of such a house under a lease from the owner of the land upon which it is situated, executes a chattel mortgage upon the house, and there is no showing as to when or by whom the house was built, or that the owner of the land ever consented that it should be personal property or be removed, *held*, that the chattel mortgage is not sufficient evidence as against third parties that the house is a chattel.

Error from Clay county.

J. S. Walker, for plaintiff in error.

C. M. Anthony, for defendant in error.

VALENTINE, J. This action was an action of forcible detainer, brought before a justice of the peace of Clay county, Kansas, by Rob-

ert Docking against J. A. D. Frazell, to recover the possession of a leasehold interest in, and a frame building on, lot 1 in block 43 in the city of Clay Center, Kansas. The facts of the case, as shown by the evidence, appear to be substantially as follows: On May 1, 1880, A. R. Keeler owned the property, or at least the lot upon which the building is situated, and on that day he leased the same for five years to A. S. Pierce. The nature of this lease is not disclosed. On August 14, 1880, A. S. Pierce sold and conveyed, by deed duly executed and acknowledged, to Frank Piquerez, "all his interest, claim, and demand in and to so much of lot 1 in block 43 in Clay Center, Clay county, Kansas, as is occupied by the building known as the 'Lindell House,' and extending from Lincoln avenue, in said city, the width of said building to the alley on south end of said lot, which said party of the first part holds under and by virtue of a lease from A. R. Keeler, running from May 1, 1880, to May 1, 1885, being 42 feet north by 140 feet deep." The name of the building was afterwards changed to the "Eagle House." On September 1, 1880, Piquerez, with his family, took possession of the property. On July 1, 1881, Piquerez executed a chattel mortgage on the house and the furniture therein to Joseph Ruot, to secure seven promissory notes for \$2,000, and filed such mortgage in the register's office July 27, 1881. Who Joseph Ruot was or is the evidence does not show. Whether he is a myth, or in fact Piquerez, or some person acting under and for Piquerez, or a *bona fide* mortgagee, the evidence does not satisfactorily disclose. On July 26, 1882, Piquerez executed another chattel mortgage on the house and furniture to Ruot to secure five promissory notes for \$1,800, and filed the same in the register's office July 27, 1882. On October 26, 1882, Piquerez became indebted to J. Christmas for the sum of \$79.50. In November, 1882, Piquerez absconded from the state of Kansas, and probably went to California, leaving his wife and family in the possession of the property. In February, 1883, W. S. Beatty, the agent of Piquerez, and Mrs. Piquerez rented the property to J. A. D. Frazell, the defendant in this action, and Mrs. Piquerez, with the family, moved out of the house and vacated the property, and Frazell took possession thereof.

Frazell was to pay the rent to Beatty for the benefit of Mrs. Piquerez, but he never paid any rent to either Beatty or Mrs. Piquerez, but paid the same to C. M. Anthony, who was, up to May or June, 1883, the attorney of Piquerez, and, at the time the rent was paid, and since, was and has been the attorney of Ruot. Anthony has had knowledge of Ruot only by letter. On March 16, 1883, Piquerez commenced an action against W. T. Bishop and Samuel Langworthy in the district court of Clay county, to enjoin them from selling the Eagle House, on the ground that it was real estate, and not subject to execution from a justice's court, in which action it was stated by the attorney of Piquerez, under oath, that the property was real estate and not personal property. The injunction was first granted

temporarily, but was afterwards, and on May 11, 1883, made perpetual. On June 5, 1883, an attachment was issued, in an action then pending in the district court of Clay county, in favor of Christmas and against Piquerez, and was levied upon the property in controversy to satisfy said claim of Christmas of \$79.50. In June or July, 1883, Anthony, as the attorney for Ruot, sold the Eagle House to Ruot for \$600 under the last-mentioned chattel mortgage. On September 22, 1883, judgment was rendered in the said action in the district court in favor of Christmas and against Piquerez for said \$79.50, and costs. On October 2, 1883, an order of sale was issued on said judgment. On November 8, 1883, the property in controversy was sold under such order of sale by the sheriff of Clay county to Robert Docking, the plaintiff in this action, for \$410. On January 16, 1884, the sale was confirmed by the court, and on January 19, 1884, the sheriff's deed to Docking was duly executed, acknowledged, and filed for record in the office of the register of deeds. The order of sale, the notices thereof, and the deed described the property as "a leasehold interest in, and one frame building known as the 'Eagle House' situated on, lot No. 1, block 43, in the city of Clay Center, Clay county, Kansas," so that Docking, of course, got whatever interest in the property that Piquerez then owned. On February 13, 1884, this action of forcible detainer was commenced before a justice of the peace of Clay county, as aforesaid. Judgment was rendered in the justice's court in favor of the plaintiff and against the defendant, and the defendant appealed to the district court, where, on May 13, 1884, a trial was had before the court without a jury, and judgment was rendered in favor of the defendant and against the plaintiff, and a motion for a new trial, made by the plaintiff, was overruled. On September 15, 1884, a case for the supreme court was duly settled and signed, and on October 13, 1884, such case was brought to the supreme court, duly attached to an appropriate petition in error.

It seems to be admitted by the parties in this court that the first and principal question involved in this case is whether the building in controversy, known as the "Eagle House," is personal property or real estate. Of course other questions are raised, but we are inclined to think that they are all either irrelevant or merely subsidiary to this main and principal question. Some of the questions, as presented by the plaintiff, are as follows: The plaintiff claims (1) that the chattel mortgages are void as to the property in controversy because such property is real estate and not a chattel; (2) that the defendant, as the tenant of Piquerez, is estopped from denying his landlord's title; (3) that because of the proceedings in the case of Piquerez against Bishop and Langworthy the defendant is estopped from denying that the property is real estate; (4) that the chattel mortgages executed to Ruot are void because of insufficiency of the description of the property; (5) also that they are void because of fraud; (6) and also

that they are void because the property was the homestead of Piquerez and family at the time when they were executed, and they were not executed by both Piquerez and wife.

If, however, the property in controversy is in its very nature and essence personal property, we hardly think that the plaintiff can maintain his action of forcible detainer. While, on the other side, if the property in its very nature and essence is real estate, the chattel mortgages must be considered as void as to it. We shall therefore proceed to consider the nature of this property. Presumptively we think it is real estate. Jones, Chat. Mortg. § 123. It is a hotel situated on real estate, has remained there for some years, has been occupied as a homestead and residence by at least two different families, and has been used as a hotel. When it was built, or who built it, is not shown. It may have been built by Pierce or Keeler, or by some previous owner of the real estate; and there is nothing in the record tending to show whether it was the intention of the person or persons building it that it should remain permanently on the land as a part of the real estate or that it might be removed at some subsequent time. As before stated, the presumption is that it was and is real estate. Also, the description of the property in the deed from Pierce to Piquerez would tend to show either that it was real estate, and intended to be such, or that it was not conveyed to Piquerez at all. It was Pierce's "interest, claim, and demand in and to so much of lot 1, in block 43," etc., as was occupied by the building that was conveyed, and not the building in terms. Piquerez, in the suit against Bishop and Langworthy, treated the property as real estate, and the court held in their favor, and enjoined its sale as personal property, and because it was real estate; and the only things in the case tending to show that it was personal property are the two chattel mortgages executed by Piquerez, and the sale of the property by Ruot's attorney, under one of the chattel mortgages, to Ruot; and this we do not think is sufficient. The house had already been built a long time before these chattel mortgages were executed, and was built before Piquerez had any interest therein or in the land upon which it was built, and was built by some other person than Piquerez. Of course, the law that personal property may be attached to real estate, and may remain personal property, with the consent of the parties, cannot be disputed; but we think it is equally true that property which has once become real estate cannot become personal property by the mere agreement of parties. And this is especially true where injury would necessarily result to the real estate by a removal of the supposed personal property. Jones, Chat. Mortg. §§ 124, 130, 131. If the house in question had been built by Piquerez under an agreement between himself and Keeler, the owner of the real estate, that the house should remain personal property and be owned by Piquerez, it would so remain personal property; but if the house had been built before Piquerez obtained any interest in it,

and had become real estate before that time, as presumptively it had, then Piquerez and Ruot could not, by a chattel mortgage or by any other agreement, convert the house into personal property, and especially not if, at the expiration of the lease from Keeler to Pierce and the assignment from Pierce to Piquerez, the entire property was to revert back to Keeler, the owner of the real estate. There was no attempt on the part of Piquerez to mortgage his leasehold estate, but it was simply an attempt to mortgage the house and other tangible property which he considered as chattels. The description of the mortgaged property is as follows:

"One two and a half story frame hotel building, located on lot No. — of block 43 of the Clay Center town site, and known as the 'Eagle House;' also all the furniture contained therein, consisting of twenty bedsteads and bedding therefor, one cooking stove, four heating stoves, one parlor set, dishes, chairs, carpets, and all other furniture not particularly described or enumerated herein, but now in possession of the said party of the first part, and kept in said building, as above set forth."

We think the decision of the court below is erroneous. Presumptively the house in question is a part of the real estate, and no sufficient evidence was introduced to show the contrary. The judgment of the court below will therefore be reversed, and cause remanded for a new trial.

(All the justices concurring.)

(34 Kan. 21)

KANSAS ROLLING-MILL Co. v. BOVARD and another.

Filed July 9, 1885.

ERROR TO DISTRICT COURT—ORDER REFUSING TO SET ASIDE SERVICE OF SUMMONS.

Petition in error from the district court to the supreme court will not lie to reverse an order of the district court refusing to set aside the service of the summons, where the case is still pending, undisposed of, in the district court.

Error from Wyandotte county.

Pratt, Brumback & Ferry, for plaintiff in error.

James B. Scroggs, for defendants in error.

VALENTINE, J. This was an action brought in the district court of Wyandotte county by James A. Bovard and Frank P. Dickson against the Kansas Rolling-mill Company, to recover on alleged acceptances by the defendant of three checks or drafts. The defendant is a corporation created under the laws of Kansas, whose place of business is or was at Rosedale, in Wyandotte county, Kansas. The sheriff of the county served the summons upon Ira Harris, who was believed to be the vice-president and managing agent of the Rolling-mill Company, and the sheriff could not find any other chief officer or board of directors or trustees in his county upon which service of summons could be made. This service of summons was afterwards set aside upon the motion of the defendant, Rolling-mill Company, and afterwards the plaintiffs attempted to obtain service of summons on the

defendant by publishing a notice in a newspaper published in said county. Afterwards, the defendant moved to set aside this service upon the grounds that no proper affidavit had been filed, and that the case was not one in which service by publication could be had. This motion the court overruled, and the defendant excepted, and now brings the case to this court.

The plaintiff in error, defendant below, says in its brief that "the point for decision is whether the lower court acquired jurisdiction of plaintiff in error by publication or by notice in a newspaper." We think, however, that the first question which can properly be presented to the supreme court for consideration is whether the supreme court has jurisdiction to determine any question involved in the case. No judgment has yet been rendered in the case nor any final order made, but the case is still pending, undisposed of, in the district court. The case does not come within any of the provisions of the statute authorizing appeals or petitions in error to the supreme court. Civil Code, § 542; *Potter v. Payne*, 31 Kan. 218; S. C. 1 PAC. REP. 617; *Dolbee v. Hoover*, 8 Kan. 124; *Brown v. Kimble*, 5 Kan. 80; *Edenfield v. Barnhart*, 5 Kan. 225. See, also, *Hockett v. Turner*, 19 Kan. 527.

We do not think that the plaintiff in error, defendant below, has any authority to bring the case in its present condition to this court, nor has this court any jurisdiction to hear or determine any of the questions involved therein; therefore the case will be dismissed from this court.

(All the justices concurring.)

(33 Kan. 718)

STATE v. CARLYLE.

Filed July 9, 1885.

INTOXICATING LIQUORS — PARTY FOUND GUILTY ON SEVERAL COUNTS — PUNISHMENT.

Where an information contains several counts, each charging the defendant with a sale of intoxicating liquor in violation of the prohibitory liquor law of 1881, and the defendant is found guilty under each count, the court may, under each count, sentence the defendant to the full amount of the punishment prescribed by statute for each offense; and, where imprisonment is imposed, may adjudge the imprisonment under one count to commence at the termination of the imprisonment under another count. Crim. Code, § 250.

Appeal from Allen county.

S. B. Bradford, Atty. Gen., and G. A. Amos, for appellee.

G. P. Smith, for appellant.

VALENTINE, J. Many of the facts of this case are similar to those of the case of *State v. Brooks*, ante, 591, and the same decision must follow. But in this case there is one question that was not involved in the *Brooks Case*. In this case, as in that, the defendant was charged upon information in four separate counts with four separate violations of the prohibitory liquor law of 1881; but in this case he was

convicted and sentenced under each count, and under each of the first three counts he was sentenced to imprisonment in the county jail for the term of 90 days, as follows: Under the first count the imprisonment was to commence at the date of the sentence; under the second count the imprisonment was to commence at the expiration of the imprisonment under the first count; and under the third count the imprisonment was to commence at the expiration of the imprisonment under the second count,—making in all 270 days' imprisonment; and under the fourth count he was sentenced to pay a fine of \$500, and he was also sentenced to pay the costs of the prosecution.

The defendant claims that such a cumulative sentence cannot be imposed upon him; that as each of these offenses is charged as a first offense, and as the limit of punishment for a single first offense is imprisonment in the county jail for a term not to exceed 90 days or a fine not to exceed \$500, he could not be imprisoned under the information for more than 90 days, and could not be required to pay a fine under the information of more than \$500, and only one of such punishments could be imposed upon him under a single information, however many counts might be contained in the information, and of however many offenses under such information he might be found guilty. We think, however, that the sentence of the court below in this respect is correct. The court had the right, and it was its duty, to sentence the defendant separately under each count; and it had the right to impose the maximum punishment under each count, and under each count could sentence the defendant to pay a fine of \$500 or to be imprisoned in the county jail for 90 days. Prohib. Liquor Law 1881, § 7. And the court also had the right, in sentencing the defendant under the several counts, to adjudge that the imprisonment under one count should begin at the termination of the imprisonment under another count. Crim. Code, § 250. Technically, we suppose, the costs incurred under each count should be taxed separately under such count; but it is wholly immaterial in this case whether the costs were taxed separately under each count or in the aggregate under all the counts.

The judgment of the court below will be reversed, and cause remanded for a new trial.

(All the justices concurring.)

SUPREME COURT OF KANSAS.

(34 Kan. 16)

CITY OF CHEROKEE v. FOX.

Filed July 9, 1885.

1. PEDDLER'S LICENSE—CITY ORDINANCE.

An ordinance of a city of the third class, requiring a "professional hawker or peddler of any article of merchandise or traffic usually kept for sale by any merchant or manufacturer of the city," to pay a license of \$2.50 per day for selling, or offering for sale, "any such article of merchandise or traffic at retail," is not void for the reason that it is class legislation, or that it makes unjust discriminations, or is partial and oppressive in its operation, or is inconsistent with public policy.

2. SAME—TITLE OF ORDINANCE.

Nor is such an ordinance void for the reason that it has no title, when in fact its title corresponds precisely with the requirements of the statute. Third-class City Act, § 17, Comp. Laws, 1879, p. 189.

3. SAME—COMPLAINT FOR VIOLATION OF ORDINANCE.

Where a person is prosecuted before the police judge of the city for a violation of such ordinance, the complaint is not void for the reason that the letters "J. P." instead of the letters "P. J.," or the words "police judge," are attached to the name of the police judge where he signs the jurat attached to the complaint.

4. SAME—EVIDENCE.

There was some evidence introduced on the trial tending to prove every material allegation of the complaint, and whether it proved the same or not is a question of fact and not one of law, and the supreme court cannot say that the complaint was not proved.

Appeal from Crawford county.

John T. Voss, for appellant.

E. A. Perry and *C. Dana Sayrs*, for appellee.

VALENTINE, J. The defendant, J. F. Fox, was tried before E. M. Bogle, police judge of the city of Cherokee, on a complaint for violating a certain city ordinance. After conviction he appealed to the district court, where he was tried before the court without a jury, and was again convicted, and was sentenced to pay a fine of five dollars, and the costs of the prosecution. He now appeals to this court. The defendant claims that both the ordinance and the complaint under which he was convicted are void, and that the evidence introduced on the trial does not prove the complaint nor any violation of any ordinance or law. He claims that the ordinance is void, for the reason that it is class legislation, that it makes unjust discriminations, is partial and oppressive in its operation, is inconsistent with public policy, and has no title. The ordinance reads as follows:

"Be it ordained by the mayor and councilmen of the city of Cherokee, Kansas: Section 1. That no professional hawker or peddler of any article of merchandise or traffic usually kept for sale by any merchant or manufacturer of this city shall be permitted to sell any such article of merchandise or traffic at retail, or offer the same for sale, within the limits of the city, without first having a license therefor, as hereinafter provided. Sec. 2. That all proprietors or transient auctioneers shall pay into the city treasury a license tax, as hereinafter provided. Sec. 3. The license tax under the provisions of this ordinance shall be at the rate of two dollars and fifty cents per day: pro-
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vided, that no license shall be issued for less than two days. Sec. 4. Any person or persons violating the provisions of this ordinance shall, upon conviction thereof, be fined in a sum not less than five nor more than twenty-five dollars for each and every offense thereof, each day's violation being considered a separate offense."

We do not think that the ordinance is void for any reason. The evidence tended to show that the defendant was a hawker, a peddler, and an auctioneer, but we would think that it was not intended in the complaint filed against him to charge him with being anything more than a hawker, or with offering his goods for sale or selling them in any other character than as a hawker, within the meaning of section 1 of the ordinance. Under that section he was not prohibited from offering his goods for sale or selling them. Under that section he could offer his goods for sale and sell them as a merchant or manufacturer without having any license therefor; or he could procure a license and then offer his goods for sale and sell them under such license as a hawker or peddler; or, if his goods were not such as are usually kept for sale by any merchant or manufacturer of the city of Cherokee, he could offer them for sale and sell them as a hawker or peddler without having any license therefor. There are some good reasons for all these distinctions and discriminations, and we cannot hold that the ordinance is invalid because thereof. Class legislation is sometimes permissible, and under some circumstances is valid. *City of Topeka v. Gillett*, 32 Kan. 434-436; S. C. 4 PAC. REP. 800. And this very kind of class legislation has already been held to be valid in Kansas. *City of Newton v. Atchison*, 31 Kan. 151; S. C. 1 PAC. REP. 288; *Tulloss v. City of Sedan*, 31 Kan. 165; S. C. 1 PAC. REP. 285.

The next question is with reference to the title to the ordinance. We think the title is sufficient; it seems to correspond precisely with the requirements of the statute. Third-class City Act, § 17; Comp. Laws 1879, p. 189. The next question is with regard to the complaint. It is claimed by the defendant that the complaint is insufficient, for the reason that it seems to have been sworn to before "E. M. Bogle, J. P.;" in other words, it is claimed that the complaint is void for the reason that Bogle, in signing his name to the jurat attached to the complaint, attached the letters "J. P." to his name, meaning justice of the peace, instead of the letters "P. J.," meaning police judge. We do not think this renders the complaint void. The title to the complaint shows that the proceedings were had before E. M. Bogle, police judge of the city of Cherokee, and there is nothing in the case that would tend to show that Bogle was a justice of the peace. But what difference could it make even if the complaint had been sworn to before Bogle as justice of the peace, when all the other proceedings were had before him as police judge? Besides, if Bogle had been a justice of the peace, and if the proceedings had been instituted before him in that character, and then the whole of the pro-

ceedings carried on before him in that character, the defendant would probably not have taken an appeal to the district court, and gone through with all the trouble and expense of a trial in that court; but would have commenced proceedings to enjoin the judgment of the justice of the peace, for the reason that the justice could not have any jurisdiction in such cases. Besides, as the appeal was taken from Bogle to the district court, the district court could take judicial notice of the official character of Bogle, and, of course, knew from what tribunal the proceedings came. And, further, it is indorsed on the copy of the complaint used in the district court that it was agreed by the parties that it was only a copy of the original, and that the original was duly signed and sworn to by the complaining witness "before E. M. Bogle, police judge," etc., and no objection was taken in that court to this copy or to the agreement thereon, and no pretense was made that the complaint had not been regularly and properly sworn to before the police judge and filed in his court. This is a weak point, and probably we should not have taken any notice of it.

It is also claimed that the evidence introduced on the trial does not prove the complaint. This is a question of fact, and not one of law; and as there was some evidence introduced tending to prove every material allegation of the complaint it would seem as though there was really nothing for us to consider, as we do not retry the case upon the evidence. We might state, however, that the evidence showed, among other things, that on or about March 12, 1884, the defendant, within the corporate limits of the city of Cherokee, erected a platform on a corner lot, near the street; had a stand on the platform, with bottles of medicine on the stand; also a woman on the platform, and an organ, and a violin, and had music and singing, drawing large crowds around him, distributed bills, offered his medicines for sale by loud talk and outcry, and sold some of the medicines. It was also shown that he had previously been in Texas and other states selling his medicines. If there was any failure in proving the complaint, it was in not proving that the medicines which the defendant offered for sale and sold were medicines usually kept for sale by some one or more of the merchants or manufacturers of the city of Cherokee. One of the medicines which the defendant offered for sale and sold he called a nervine, or "Star Nervine." He also sold medicines which he recommended for various diseases. It was also shown that nervines were sold in the drug stores of the city of Cherokee, and also that medicines were sold in such drug stores for all the various diseases for which defendant recommended his medicines; but no witness testified that the defendant's medicines were identical with any of those sold in the drug stores, nor do we think that it was necessary. All that we think was necessary was to show that he sold medicines which were substantially the same as those sold in the drug stores. For instance, if the principal ingredient of the medicine which he sold as a nervine, and the ingredient which made it a nerv-

ine, was the same as the nervines sold in the drug stores, that was sufficient, although his medicine which he called a nervine may have contained other ingredients besides a nervine in fact; but, as before stated, the question whether the complaint was proved or not is one of fact, and it was submitted to the court below upon the evidence, and the court below found against the defendant, and we think the finding must now stand, although the evidence against the defendant may not be very convincing or satisfactory.

The judgment of the court below will be affirmed.
(All the justices concurring.)

(34 Kan. 53)

PACKARD v. PACKARD.

Filed July 9, 1885.

DIVORCE—ALIMONY—CUSTODY AND MAINTENANCE OF CHILDREN.

Error from Dickinson county.

G. F. Grattan, for plaintiff in error.

Stambaugh & Hurd and McClure & Austin, for defendant in error.

PER CURIAM. Action for divorce and alimony. The record shows that this case was tried at the March term of the court for 1884. Both parties were represented by their respective attorneys. After all the evidence had been submitted on the part of the plaintiff and defendant the court rendered its decree, granting the wife a divorce as prayed for in her petition, and also awarded her the custody of all her children, four in number. No order or judgment, however, was rendered specifying the amount of money the defendant would be required to pay for the support of the wife and children. The court then adjourned *sine die* on March 11, 1884. Before adjourning "the judge of the court stated that if it would be convenient for counsel it would be an accommodation to him to have the journal entry settled at Junction City, Davis county, Kansas, the following week;" and thereupon all of the counsel agreed that the journal entry in the case should be settled at Junction City on March 21, 1884, and filed in the court at Dickinson county as of March 11, 1884. Thereafter, on March 21, 1884, the plaintiff, by her attorneys, and the defendant, in person and by his attorneys, appeared before the district judge at Junction City, and then agreed upon a journal entry, which was afterwards signed by the judge.

This journal entry provided that the defendant should pay to the wife, for the support and maintenance of the minor children, so long as she should have the care and custody of them, \$150 per annum for each of the children; and that defendant should pay to the wife, as alimony, the sum of \$200, which payment should continue to the wife for her life, unless she should marry again, in which case the alimony to her was to cease from the date of her marriage. As these orders were not made or rendered during the March term of the dis-

strict court of Dickinson county, such orders and judgment were improperly embraced in the journal entry. If these orders and judgment were rendered at Junction City, then, within the authority of *Earls v. Earls*, 27 Kan. 538, they are void and of no effect. If they were not made and rendered at Junction City, they were never made or rendered at any other place. Before the journal entry was spread upon the records of the district court of Dickinson county the plaintiff objected thereto in proper form. All of the objections of plaintiff were overruled. Instead of overruling the objections the court should have stricken from the journal entry the orders relating to the sums awarded the wife as alimony, and also awarded her for the support and maintenance of the children, as these orders and judgment were not rendered upon the trial of the case or during the session of any term of court. Our conclusion, therefore, is that so much of the journal entry as regards the granting the wife the divorce, as prayed for in the petition, and that awards her the custody of all her children, is valid, and must stand as the judgment of the district court; but, so much of the decree as allows specific sums for alimony for the wife, and for the support of the children, must be set aside, vacated, and held for naught.

As the question of alimony will again be before the trial court for decision, we deem it proper to say that if the defendant is a person of large property, as indicated in the brief of plaintiff, the money allowed the wife as alimony is wholly inadequate. Even if the husband is a man of moderate means the wife ought to receive a much greater allowance than the amount embraced in the journal entry. As the divorce to the wife was granted by reason of the fault and aggression of the husband, the wife should be allowed such alimony as would maintain her and her children in as good a condition as if she were still living with her husband.

In deciding this case we have considered the "case made" only, and have wholly disregarded the affidavits filed. It is also proper for us to say that in setting aside and vacating the judgment for alimony, and for the support of the children, we do not reflect upon the action of the district judge at Junction City in any manner whatever, because all of the proceedings had at Junction City were by and with the consent of the attorneys of plaintiff, and the defendant and his attorneys; but consent of parties does not confer jurisdiction under the circumstances stated, and therefore the judgment for alimony and for the support of the children is void. The acceptance by the plaintiff of \$200, and the payment to her attorneys of \$60, do not affect the case, because such payments cannot render a void judgment valid or binding.

The judgment allowing specific sums for alimony and providing for the support of the children must be vacated, and the cause remanded for a new trial as to these matters.

(34 Kan. 49)

SEARLE v. CLARK.

Filed July 14, 1885.

ELECTION OF JUSTICE OF THE PEACE—BALLOTS—EVIDENCE.

Original proceedings in *quo warranto*.*Leland J. Webb*, for plaintiff.*Waters & Chase* and *R. A. Friedrich*, for defendant.

PER CURIAM. The ballots in this case have been properly preserved, and the evidence is conclusive that they have not been changed or tampered with. Having, therefore, been identified beyond all reasonable doubt, they are competent evidence, and controlling. The rule was properly stated in *Dorey v. Lynn*, 31 Kan. 758, S. C. 3 Pac. Rep. 557, that "whenever the ballots can be properly identified they are, of course, the best evidence; much better and more reliable than a mere abstract or summary of the same made by the election officers." Upon a count of the ballots by the commissioners appointed by this court for that purpose, it appears that the plaintiff received at the city election on April 7, 1885, for justice of the peace, 1,229 votes, and that H. S. Clark, the defendant, only received 1,217 votes. Our attention has been called to the ballots that were rejected by the commissioners; these have been carefully and critically examined by the court. Giving the defendant the benefit of all the ballots of which we have any doubt, the plaintiff still has a majority of six. It is therefore the opinion of this court that the plaintiff was elected as justice of the peace of the city of Topeka at the city election held in said city on April 7, 1885, and is now entitled to said office, and that the defendant was not elected to said office at said election. It is therefore the judgment of this court that the defendant be ousted and excluded from the office of justice of the peace of the city of Topeka, and that he be required to deliver over at once to the plaintiff all books, papers, and documents in his custody, or under his control, belonging to the office of justice of the peace of the city of Topeka, and that the plaintiff recover from the defendant all costs in his behalf expended, taxed at \$—, for which let execution issue.

(34 Kan. 1)

STATE v. FORBRIGER.

Filed July 9, 1885.

1. CRIMINAL LAW—ORDER REFUSING WARRANT OF ARREST—APPEAL.

Where a private citizen presents to the judge of the district court a complaint in writing, and under oath, charging the defendant with the commission of a misdemeanor, for which the punishment may be a fine not exceeding \$500 and imprisonment in the county jail not exceeding one year, and the complainant demands of the judge that a warrant shall be issued for the arrest of the defendant, and that the judge shall take cognizance of the complaint, and hear and determine the case, and the judge refuses, *held*, that no appeal lies to the supreme court from such refusal.

2. QUERY:

Is not the decision of the judge in such a case correct?

Appeal from Atchison county.

Coates & Bird, for appellant.

Mills & Wells, for appellee.

VALENTINE, J. On February 14, 1885, Luther C. Challis, a private citizen, presented to the Hon. DAVID MARTIN, judge of the district court of the Second judicial district, a complaint in writing, and under oath, charging Robert Forbriger with the commission of a public offense, a misdemeanor, under section 210 of the crimes and punishment act, for which offense the punishment may be a fine not exceeding \$500, and imprisonment in the county jail not exceeding one year. The complainant demanded of the judge that a warrant should be issued for the arrest of Forbriger, and that the judge should take cognizance of the complaint, and hear and determine the case. The judge, however, refused so to do, and from such refusal a supposed appeal, ostensibly by the state, has been taken to this court. We think the supposed appeal must be dismissed, for the reason that no appeal in any such case is authorized by any statute of the state of Kansas. The case has never been in the district court, and no jurisdiction has ever been obtained over Forbriger by any court or judge. The case was instituted before Judge MARTIN as a supposed magistrate, under the supposed authority of sections 7, 35, and 36 of the Criminal Code. Now, supposing that the judge of the district court is a magistrate under said sections, and that he might take jurisdiction in any case provided for by the same, still no appeal from the decision of such magistrate in such a case will lie to the supreme court, or to any other court. The proceeding in such a case is merely a preliminary examination, which is not appealable to any court. But even if we should consider that the proceeding in such a case is more than a preliminary examination, and that the judge of the district court is invested by these sections, and section 1, art. 1, of the justice's misdemeanor act, with the same jurisdiction that a justice of the peace would have in a like case, and with the power to hear and determine the case finally upon its merits, still neither the state, nor any private citizen prosecuting in the name of the state,

would have any appeal to the supreme court or to any other court, but the defendant only would have such appeal, and his appeal would not be to the supreme court, but to the district court. Justice's Misdemeanor Act, art. 4, § 21.

The defendant, however, in this case is charged with the commission of a misdemeanor in which the punishment cannot exceed a fine of \$500 and imprisonment for one year, and there is no necessity for a preliminary examination in such a case, even if a preliminary examination could be had at all, (*In re Donnelly*, 30 Kan. 191, 424; S. C. 1 PAC. REP. 648, 778;) and only justices of the peace, and the district courts have original jurisdiction to hear and determine such cases upon their merits. *In re Donnelly*, *supra*; Justice's Misdemeanor Act, art. 1, § 1. District judges have no such jurisdiction in such cases. Previous to March 1, 1869, justices of the peace had exclusive original jurisdiction of this class of cases, but at that time the law was so changed that the district courts now have equal and concurrent jurisdiction with justices of the peace, but there is no provision anywhere in the statutes authorizing any other court or any judge or magistrate to take original jurisdiction of such cases. Hence the jurisdiction is exclusive in justices' courts, and in the district courts. Besides, in the district courts all criminal prosecutions must be carried on upon informations filed by a public prosecutor, or indictments found by the grand jury, (*State v. Brooks*, *ante*, 591,) and not upon complaints filed by a mere private citizen. But it is not claimed in this case that this prosecution has been instituted in the district court, but it is claimed that it has been instituted before the district judge as a magistrate, under said sections 7, 35, and 36 of the Criminal Code. We suppose that it will hardly be claimed that the judge could exercise jurisdiction over this class of cases as a judge of the district court at chambers, for chambers business relates merely to matters pending, or to be instituted, in the judge's own court, and not to matters having no connection with his court, or which relate only to something pending in some other court, or before some other magistrate. Besides, if the case is to be tried before the judge upon its merits, the defendant would be entitled to a jury trial, and a judge at chambers could not impanel a jury.

If, however, it should be claimed and admitted that the judge in a case like this would not be exercising jurisdiction of matters pertaining to the district court, but would be exercising jurisdiction as a magistrate, or some other court, independent of the district court, then would he not, in exercising such jurisdiction, be violating that provision of the constitution of the state which prohibits all judges of the district courts and justices of the supreme court from holding "any other office of profit or trust under the authority of the state or United States during the term of office for which said justices and judges shall be elected?" Const. art. 3, § 13. A district judge should not be both a judge of the district court and a magistrate independent of

such court. The positions are not merely one, but are two; and the position of magistrate is certainly an office of trust, if not of profit.

We think the appeal in this case must be dismissed, for the reason that no appeal in this class of cases lies to the supreme court. If, however, we should go further in this case and investigate the merits, which it has not been our intention to do except incidentally, we would probably reach the same conclusion that the judge of the district court did.

(All the justices concurring.)

SUPREME COURT OF CALIFORNIA.

(2 Cal. Unrep. 507)

PARKER v. BERNAL. (No. 11,018.,

Filed July 31, 1885.

APPEAL WITHOUT MERIT—DISMISSAL.

Though an appeal appear totally destitute of merit, yet, if regularly taken, the court will be reluctant to dismiss it summarily.

Department 2. Appeal from superior court, city and county of San Francisco. Motion to dismiss appeal.

Moses G. Cobb, for appellants.

Chas. H. Parker, for respondents.

By THE COURT. The appeal in this case is totally destitute of merit. But, as the appeal seems to be regularly taken, we are reluctant to dismiss it directly. The motion to dismiss is therefore denied, which is ordered, with leave to either party to submit the case for decision after the lapse of 10 days from the filing of this opinion.

(2 Cal. Unrep. 508)

MEYSAN v. CHABRIE. (No. 9,354.)

Filed July 31, 1885.

1. APPEAL—RECORD, WHAT MUST APPEAR IN.

An appeal from a judgment cannot be considered if the record shows no entry of it.

2. JUDGMENT AFFIRMED.

No error appearing from the record, judgment affirmed.

Department 2. Appeal from superior court, county of Inyo.

Reddy & Conklin, for appellant.

J. W. P. Laird, for respondent.

By THE COURT. The appeal from the judgment cannot be considered, as the record shows no entry of it. *McLaughlin v. Doherty*, 54 Cal. 519; *Preston v. Hearst*, Id. 596.

It does not appear on what the order on the motion to vacate the judgment by default was made. The record shows no authentication in any mode of any papers or documents used on the hearing of such motion. The only document before us on such appeal is the order of the court made on the motion, and in this order we see nothing erroneous.

Appeal from the judgment dismissed, and order affirmed.

(2 Cal. Unrep. 500)

HALEY v. SHEPHERD. (No. 9,901.)

Filed July 31, 1885.

APPEAL—CONFLICTING TESTIMONY.

Where, on appeal, the case presented is one of conflict of testimony, the judgment of the lower court will not be disturbed.

Department 2. Appeal from superior court, county of Los Angeles.

H. Allen and S. Haley, for appellant.

Bicknell & White, for respondent.

By THE COURT. On an examination of the testimony in this case, we cannot say that the conclusion reached by the court below is not correct. It seems to us to be in accord with the deed from the mayor and common council of the city of Los Angeles to Basilio Jurado, under which plaintiff claims. The case presented is one of a conflict of testimony, and in such state of the testimony we never disturb the judgment or order of the court below.

Judgment and order affirmed.

(67 Cal. 185)

SHARON v. SHARON. (No. 9,984.)

Filed July 29, 1885.

1. ACTION FOR DIVORCE—APPEAL LIES TO SUPREME COURT.

An action for divorce is a case in equity, and therefore, under the constitutional provision for appeals in cases in equity, an appeal lies to the supreme court from a judgment of the superior court granting a divorce.

2. SAME—ORDER FOR ALIMONY, PENDENTE LITE, APPEALABLE.

An order made by the superior court in a divorce suit, *pendente lite*, for the payment of alimony, is appealable. *Church v. Church*, (not reported;) *Macnevin v. Macnevin*, 63 Cal. 186; *Ex parte Cottrell*, 59 Cal. 417; and *Ex parte Perkins*, 18 Cal. 60, explained and distinguished.

3. REHEARING GRANTED.

Rehearing granted on question as to character of bond necessary to stay proceedings upon order for payment of alimony.

In bank. Appeal from superior court, city and county of San Francisco. Petition for rehearing. The opinion of the court in bank, filed June 29, 1885, is reported *ante*, 456.

W. H. L. Barnes, O. P. Evans, and Stewart & Herrin, for appellant.

Tyler & Tyler, D. S. Ferry, Geo. Flournoy, and Walter Levy, for respondent.

Ross, J. In the opinion recently delivered in this case we held—*First*, that an action for divorce is a case in equity, and that an appeal lies to the supreme court from the judgment of the superior court granting a divorce; and, *second*, that an order made *pendente lite* by the superior court, directing the payment of alimony, is also appealable. In the petitions for rehearing on file it is said by counsel for the plaintiff that, in holding that the order for the payment of ali-

mony is appealable, we have decided exactly contrary to several former decisions of this court. *Church v. Church*, (not reported;) *Macnevin v. Macnevin*, 63 Cal. 186; *Ex parte Cottrell*, 59 Cal. 417; and *Ex parte Perkins*, 18 Cal. 60, are the cases in which it is said by counsel that an opposite conclusion was announced. In *Church v. Church* no order *pendente lite* for the payment of alimony was made by the superior court. The question as to whether such an order was or was not appealable could not, therefore, by any possibility have arisen in the case. The trial court there granted the plaintiff a divorce, and in its decree granting the divorce awarded the plaintiff permanent alimony, and a certain stated sum for fees of counsel. From that decree the defendant gave notice of appeal to this court, and, within statutory time, executed an undertaking, pursuant to section 941, Code Civil Proc., in the sum of \$300. There can be no sort of doubt that the notice and undertaking thus given perfected the appeal to this court from the final judgment of the superior court. The only question in *Church v. Church* was as to a stay of proceedings upon the judgment. The only undertaking given by the appellant was the one in the sum of \$300 for the payment of such costs and damages as might be awarded on the appeal; but the appellant subsequently applied to the superior court to fix the amount of an undertaking to be given by him for the purpose of staying all proceedings on the judgment, and, the application being denied by the superior court, a similar application was made here and denied,—no opinion being delivered. This was the case of *Church v. Church*, and all of it, which is cited and deliberately stated by counsel for the plaintiff in the present case to have decided that there was no appeal from an intermediate order in an action of divorce directing the payment of alimony. No argument can make plainer the fact that no such question was or could have been involved in *Church v. Church*. And so with respect to the other cases cited by counsel for plaintiff. A bare statement of the facts will clearly show that in none of them has this court ever decided contrary to what we have held in the present case.

In *Macnevin v. Macnevin*, 63 Cal. 186, which was an action for divorce, the district court had, pending the action, made orders from time to time directing the defendant to pay certain sums as alimony, which orders, though enforceable by executions, were in fact never enforced. The court, after trial, ordered "that plaintiff's prayer for divorce be denied, and that defendant have judgment for costs." After the making of this order, on motion of defendant's counsel, all the orders formerly made, granting to the plaintiff alimony, were vacated, and from this last order the plaintiff appealed, as from an order made after final judgment. But the court held that the record only showed an order for judgment, and therefore that the order setting aside the orders granting alimony was not an order made after final judgment, and consequently not appealable.

In *Ex parte Cottrell*, 59 Cal. 419, this court distinctly said: "Whether any undertaking could be given which would operate as a stay of the execution of the order (for the payment of alimony) pending the appeal, or whether any appeal lies from such an order, are questions which do not necessarily arise in this case, and we therefore express no opinion upon them." Yet counsel for the plaintiff here says that in *Ex parte Cottrell* we decided that no appeal lay from an order directing the payment of alimony. It is difficult to deal patiently with such perversions of fact.

Ex parte Perkins, 18 Cal. 60, is the only other case in which it is said by plaintiff's counsel that this court has held that there was no appeal from an order granting alimony. In that case Perkins was, by an order of the court, directed to pay a sum of money for expenses incurred by his wife in the action for divorce, and, having refused to do so, was imprisoned, and sought to be discharged from imprisonment on *habeas corpus*, upon the ground that the sum adjudged against him was a debt within the meaning of that provision of the constitution which secured the citizen against imprisonment for debt, except for fraud. The court held, and properly held, that the amount ordered to be paid by the husband was not a debt within the meaning of the constitution; that the husband did not owe the wife any specific sum of money, but he owed a duty to her which might be enforced by order of the court, compelling him to pay her money: The question there—the case being *habeas corpus*—involved only the power of the court to make the order. No question of appeal was involved, nor could the regularity of the proceedings be in any way considered.

There is no inconsistency between that case and our ruling in the present one. We have never said that an order for the payment of alimony was a final judgment, in the sense that a judgment for the payment of money from one man to another is, but we said, as did the supreme courts of Illinois and Kentucky, in the cases cited, that it was *in the nature of a final judgment*, possessing the essential elements of such judgment, and which could be enforced, not only by execution against property, but by imprisonment of the body of the delinquent. We repeat the fact that the question under consideration has never before been passed upon in this state, and that it is with us, as the case of *Blake v. Blake* was with the supreme court of Illinois, one of first impression. The court there says:

"The question raised is one that has never been passed upon by this court, but, upon first impression, we are of opinion the appeal will lie. It is a money decree, is for a specific sum, and is payable absolutely. No execution has been as yet awarded, but the court has the undoubted authority to award an execution, or, if payment was willfully and contumaciously refused, the decree might be enforced by attachment as for contempt, or payment might be coerced by sequestration of real or personal estate. By one mode or the other the decree could be enforced, and, if the defendant has property, it could, in some way consistently with the practice in courts of chancery, be subjected to its payment. Such a decree does not seem to us to be merely interlocutory.

It is more in the nature of a final decree; and, if no appeal lies, this case affords an instance of a money decree against a party from which no relief can be had, no matter how unjust or oppressive. This ought not to be. It is no answer to this position to say defendant can have this decree against him reviewed on appeal or error, after final decree in the original cause. Of what avail would that privilege be to him then? The litigation might be protracted, and years elapse before any final decision could be reached. In the mean time he has been imprisoned for disobedience to the decree, or his property, under process of law, been subjected to the payment of the sum decreed. Nor does the fact an appeal is allowed impose any hardship not incident to other money decrees from which appeals may be prosecuted. On the theory alimony is for the immediate benefit of the wife, to enable her to prosecute or defend her suit against her husband on terms of equality, the only serious result would be to delay the litigation until the propriety of the decree for temporary alimony and solicitors' fees could be determined in the appellate court. On the contrary, if an appeal should be denied, it might subject defendant to very great hardships in many cases, as the sequel will show." 80 Ill. 523.

The allowance of alimony is largely discretionary with the trial court, and will, therefore, be interfered with by the appellate court only in cases of abuse of discretion. Ordinarily, in actions for divorce, the marriage relation is not controverted, and should frivolous appeals be taken, it will be an easy matter to impose such penalty as will put a stop to the practice. But in cases where the fact of marriage is the real issue no alimony should of right be paid until the fact of marriage or no marriage is properly determined, for the obvious reason that there can be no such thing as alimony unless the relation of husband and wife in fact exist. There is, however, some question as to the character of bond necessary to stay proceedings upon the order for the payment of alimony. With respect to that question, and to that only, there is some inconsistency in the opinions of the court, and upon that question, and that only, we desire to hear further argument, and for that purpose and to that extent only grant a rehearing.

We concur: THORNTON, J.; MCKINSTRY, J.; MORRISON, C. J.; SHARPSTEIN, J.

MYRICK, J. I agree with the views presented by Ross, J., down to the reasons given for a rehearing. I am satisfied with the judgment heretofore given. I wish to add the following to what has been said in favor of the appellate jurisdiction of this court:

Independent of what has been already said, I am of opinion that under the present constitution there can be no question as to the appellate jurisdiction of this court in the case of an alimony order. I base this view on the terms of the constitution, viz., (article 6, § 5:) "The superior court shall have original jurisdiction in all cases in equity." Article 6, § 4: "The supreme court shall have appellate jurisdiction in all cases in equity." Wherever and whenever a superior court has jurisdiction to take any step or proceeding, or make any order, in any case in equity, of that step, proceeding, or order the

supreme court has appellate jurisdiction. The legislature may provide machinery; it may declare when the appeal may be taken, (as, in regard to orders which involve the merits or necessarily affect the judgment, it has done;) but neither by direct action nor by omission can the appellate jurisdiction of this court be abridged; it is given by the constitution in such plain and unequivocal words that it cannot be shorn off. If, then, an action to have the validity of an alleged marriage determined and declared, or for divorce, be a case in equity, it conclusively follows that any order, step, or proceeding which the superior court has jurisdiction to make in such action is subject to review by this court.

By way of contrast, and to show more clearly, if need be, the meaning of the above-quoted clauses of the constitution, I quote, as to probate matters, article 6, § 5: "The superior court shall have original jurisdiction * * * of all matters of probate." Article 6, § 4: "The supreme court shall have appellate jurisdiction * * * in all such probate matters as may be provided by law."

In probate, appellate jurisdiction is given in such matters only as the legislature may provide; while in equity cases the appellate jurisdiction is as broad and extensive as is the original jurisdiction. It has been repeatedly held that where appellate jurisdiction is given, and no machinery is prescribed, the appellate court will furnish machinery, to the end that the right of review be not lost. *Houghton's Appeal*, 42 Cal. 35; *People v. Jordan*, 4 PAC. REP. 688, 773.

As to whether the action now under consideration is a case in equity, has been considered in the opinion heretofore filed, and I do not deem any addition in that regard necessary or useful.

SHARON v. SHARON. (No. 9,984.)

Filed August 1, 1885.

OPINION MODIFIED.

In bank. Appeal from superior court, city and county of San Francisco. The opinion modified hereby is the opinion on rehearing, filed July 29, 1885, *ante*, 635.

W. H. L. Barnes, O. P. Evans, and Stewart & Herrin, for appellant.

Tyler & Tyler, D. S. Terry, Geo. Flournoy, and Walter Levy, for respondent.

By THE COURT. Counsel for plaintiff feel aggrieved, and claim that the opinion as written charges them with willful perversion of facts. As that was not intended, and as the opinion goes into the reports, it is ordered that the expression "it is difficult to deal patiently with such perversions of facts" be stricken from the opinion.

(67 Cal. 231)

PEOPLE v. VIERRA. (No. 20,046.)

Filed July 28, 1885.

CRIMINAL LAW — PRELIMINARY EXAMINATION — INFORMATION — CRIME, HOW CHARGED.

Where a person charged with the commission of a felony is, after preliminary examination, held to answer, the district attorney, in filing the information required by statute, (Pen. Code Cal. § 809,) is not bound to charge the defendant therein with the offense designated by the committing magistrate in his indorsement on the depositions taken on the preliminary examination, but may examine the depositions, ascertain the offense, and charge the same according to the facts as disclosed by the depositions.

Department 2. Appeal from superior court, county of Fresno.

The Attorney General, for appellant.

Tupper & Tupper, for respondent.

THORNTON, J. The defendant was accused by information of murder, and was convicted of manslaughter. On his arraignment his counsel moved the court to set aside the information, on the ground that the commitment holding defendant to answer in the complaint filed in the committing magistrate's court ordered that the defendant be held to answer for the crime of manslaughter, and the information filed against him accuses him of murder. The defendant further moved that the district attorney be directed to file an information against defendant for manslaughter. In support of this motion, counsel for defendant read the complaint filed with the magistrate, which charged the defendant with murder, and also read the commitment and order of the magistrate indorsed on the complaint, which is in these words:

"It appearing to me that the offense of manslaughter has been committed, and that there is sufficient cause to believe that Jose F. Vierra, the defendant, is guilty thereof; that the said defendant did willfully, unlawfully, and feloniously cut and stab about the abdomen one Manuel Maria, with a certain dirk-knife, about the abdomen, a human being, from the effects of which the said named, the said Manuel Maria, soon after died,—I order that the said Jose F. Vierra be held to answer to the same, and committed to the sheriff of the county of Fresno, and that he be admitted to bail in the sum of \$3,000, and is committed to the sheriff of the county of Fresno until he give such bail."

The court denied the motion, and defendant excepted.

The proceeding by information for a capital offense is one which has come into use under the present constitution, adopted in 1879. Const. art. 1, § 8. Under the former constitution an indictment was required. Const. 1849, art. 1, § 8. The section of the present constitution authorizing the proceeding by information is as follows:

"Sec. 8. Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county."

The defendant on his arrest must be taken before a magistrate, (Pen. Code, §§ 821, 822,) who must proceed to examine the case.

Pen. Code, §§ 858, 859, 860. The testimony of each witness, in cases of homicide, must be reduced to writing, as a deposition, by the magistrate, or under his direction. Pen. Code, § 869. The testimony must be authenticated in the mode set forth in the section last cited, and the depositions must be returned to the clerk of the court at which the defendant is required to appear, together with the warrant, undertakings of bail, etc. Pen. Code, §§ 869, 883.

It is provided, by section 872 of same Code that, when it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the depositions an order, signed by him, to the following effect:

"It appearing to me that the offense in the within depositions mentioned (or any offense, according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer to the same, and be committed to the sheriff of the county of _____."

It is further provided (section 809, Pen. Code) that—

"When a defendant has been examined and committed, as provided in section 872 of this Code, it shall be the duty of the district attorney, within thirty days thereafter, to file in the superior court of the county in which the offense is triable an information charging the defendant with such offense."

The contention of defendant here is that the offense with which the defendant must be charged by the information to be filed is the offense designated by name by the committing magistrate in the indorsement on the depositions required to be made by section 872 of the Penal Code, and not the offense disclosed by the depositions. We use the expression, "disclosed by the depositions," for that, in our opinion, is the signification of the words, "in the depositions mentioned," used in section 872. The offense by name need not be, nor is it usually, mentioned or designated *by name* in the depositions. The facts showing the nature and degree of the offense appear therein. Must the district attorney act on the facts as appearing in the depositions, or must he take the judgment of the committing magistrate thereon as shown by the name by which he shall designate the offense in his indorsement? The committing magistrate is usually a justice of the peace, either unlearned in the criminal law, or acquainted with it to a limited extent. It would be a strange requirement which permitted the justice to determine the offense for which the defendant should be prosecuted, instead of the district attorney, who is selected on account of his learning in the law, and especially charged with duties requiring an acquaintance with the criminal law. In England, where prosecutions were allowed by information, they were made by the attorney general, or by the solicitor general, when the office of attorney general was vacant, or by the king's coroner or attorney in the king's bench. The officers first named acted on their own official discretion, without the interference of the court, and without previous examina-

tion. Bish. Crim. Proc. § 143, and Bl. Comm. 308. Such proceeding was only allowed in England in cases of misdemeanor, except misprision of treason, and was not permissible in any felony. But the higher the nature of the offense, it is clear that, for the protection of defendant, as well as of the state, the duty should be vested upon an officer acquainted with the law concerning crimes and offenses.

It may be conceded that the power to designate the offense for which the defendant is to be put upon his trial might be vested by the legislature in the committing magistrate; but the statute must be expressed in terms other than those in which we find them in the Code, to justify this court in coming to such a conclusion.

In our opinion section 809 refers to the offense shown by the testimony disclosed in the depositions taken on the preliminary examination before the committing magistrate, and not to the offense designated by name, or even generally, by such magistrate in his indorsement made on the depositions. It will be observed that the offense is to be designated *according to the fact*. Where is the fact to be found? Manifestly in the testimony contained in the depositions. If the justice named an offense which the testimony had no tendency to show had been committed, must the district attorney still charge such offense in the information? Clearly not. The district attorney is to act on the depositions, and to prefer the information charging the offense which the facts disclosed in such depositions show, or tend to show, has been committed by the defendant. For this purpose, among others, the depositions are required to be returned to the court at which the defendant is to appear. The provision in the constitution requiring an examination and commitment is to secure persons accused of crime from being proceeded against until there has been a preliminary trial before some judicial officer to determine whether there is a reasonable or probable cause for putting the defendant on his trial. When this is done, and the defendant is held to answer, the constitutional requirement has been complied with. The responsibility is then thrown on the district attorney to determine, from the testimony above referred to, the offense to be charged in the information. We see no reasonable objection to this view. We think it correct, and by it no right of the accused party is impaired, and there is no obstacle to a fair trial of the defendant for the offense charged. We are of opinion that the court below did not err in refusing to set aside the information herein. *People v. Lee Ah Chuck*, 6 PAC. REP. 859. The instruction to which our attention is directed is not obnoxious to the objection that it could under no circumstances be correct.

We find no error in the record, and the judgment and order are affirmed.

We concur: MYRICK, J.; SHARPSTEIN, J.

(67 Cal. 223)

PEOPLE v. BEZY. (No. 20,060.)

Filed July 28, 1885.

1. MURDER—EVIDENCE OF THREATS.

While threats against the deceased are admissible in evidence in a trial for murder, to show malice, threats against another person are only admitted under circumstances which show some connection with the injury inflicted on the deceased.

2. SAME—EVIDENCE OF CHARACTER—ADMISSIBILITY OF.

On trial for murder, evidence is admissible as to general character of defendant for peace and quietness, but evidence of particular facts is not admissible on such issue.

3. SAME—EVIDENCE OF CHARACTER OF DECEASED.

On trial for murder it is error to permit the prosecution to give evidence as to the character of the deceased for peace and quietness.

4. PRACTICE—OPENING STATEMENT BY COUNSEL.

It is not error nor abuse of discretion, in criminal trial, for court to restrict counsel for defendant in the opening statement to stating what he expects to prove, without any argument upon such facts.

Department 2. Appeal from superior court, Fresno county.

The Attorney General, for appellant.

W. D. Tupper, for respondent.

THORNTON, J. The defendant was accused of the murder of John Mengetti, and on his trial the court admitted evidence, against objection, of certain threats made against Joe Mengetti. Joe Mengetti was the brother of the deceased, and the evidence shows that they lived together, and were cousins and neighbors of defendant. While threats against the deceased are admissible in evidence to show malice, threats against another person are only admitted under circumstances which show some connection with the injury inflicted on the deceased. We are of opinion that the circumstances under which the threats were made are not sufficient to show such connection as justified the admission of the evidence. It may be said that the evidence was admissible as to the general character of defendant for peace and quietness, but evidence of particular facts is not admissible on such issue. We think the court fell into an error in admitting the evidence above referred to, and as it is not clear that this testimony did not operate prejudicially to the defendant, we are of opinion that it must cause the reversal of the judgment and the order denying the motion for a new trial. There was also evidence of threats (in Julius Hedrick's testimony) against the Mengettis, which we think was admissible.

The court erred in permitting the prosecution to give evidence as to the character of the deceased for peace and quietness. *People v. Anderson*, 39 Cal. 704. The court committed no error or abuse of discretion in restricting counsel for defendant in his opening statement to stating what he expected to prove, without any argument upon such facts. *People v. Anderson*, 44 Cal. 65. The counsel had abundant opportunity in the course of the trial in suggesting and arguing all points of law pertinent to the cause.

For the errors above pointed out the judgment and order should be reversed, and the cause remanded for new trial; and it is ordered accordingly.

We concur: MYRICK, J.; SHARPSTEIN, J.

(67 Cal. 225)

PEOPLE v. NEASON. (No. 20,085.)

Filed July 28, 1885.

CRIMINAL LAW—BURGLARY—PROOF OF PRIOR CONVICTION OF PETIT LARCENY.

Where defendant was charged in the information with burglary and a prior conviction of petit larceny, and was convicted of burglary in the first degree, but was allowed to plead guilty to the charge of prior conviction without evidence or verdict thereon, and was thereon sentenced to 15 years' imprisonment, there is no error, as the defendant might have been sentenced to such imprisonment without consideration of the charge of petit larceny. *People v. King*, 12 Pac. Coast L. J. 322, distinguished.

Department 2. Appeal from superior court, San Diego county.

The Attorney General, for appellant.

Leach & Parker, for respondent.

MYRICK, J. The defendant was accused by information of the crime of burglary, and was convicted of burglary in the first degree, and sentenced to 15 years' imprisonment in the state prison. The information contained a charge that the defendant had been previously convicted of petit larceny. One point only is presented on this appeal, viz.: The defendant, being charged with having suffered the previous conviction of petit larceny, was allowed to admit and plead guilty to that charge, and no evidence was introduced to prove the same, nor any verdict rendered thereon. The defendant refers to the decision of this court in *People v. King*, 12 Pac. Coast L. J. 322, as authority that the proceedings in this case show error. The difference in the two cases is this: In *People v. King* the defendant was accused of the crime of petit larceny and a former conviction of felony, in which case the conviction for petit larceny would not justify imprisonment in the state prison unless the proceedings as to the former conviction were regular; while in the case before us, upon conviction for burglary in the first degree, the defendant might have been sentenced to 15 years in the state prison, independent of the former conviction for petit larceny. The proceedings in this case as to petit larceny may be laid aside and the judgment stand, no error appearing.

Judgment affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(67 Cal. 237)

SOMERS v. OVERHULSER. (No. 8,835.)

Filed July 30, 1885.

TRUST—PURCHASE OF LAND—RESULTING TRUST.

Where land is purchased, for which one party pays the consideration and another takes the title, a resulting trust immediately arises in favor of the party paying the consideration; and so, also, where one party pays only part of the consideration, the party taking the title to the whole becomes trustee for the other party *pro tanto*.

Department 1. Appeal from superior court, Fresno county.

E. D. Edward and *H. S. Dixon*, for appellant.

H. C. Tupper, Tupper & Terry, and *E. C. Winchell*, for respondents.

Ross, J. It is the settled rule in this state, as elsewhere, that when land is purchased for which one party pays the consideration and another party takes the title, a resulting trust immediately arises in favor of the party paying the consideration, and the other party becomes his trustee; and also that if the one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party *pro tanto*. *Case v. Coddling*, 38 Cal. 191. The facts of the present case bring it within this rule. See, also, section 2224, Civil Code.

Judgment reversed and cause remanded, with directions to the court below to overrule the demurrer to the complaint, with leave to defendants to answer.

We concur: *McKee, J.*; *McKinstry, J.*

(67 Cal. 257)

Ex parte DRESSLER on Habeas Corpus. (No. 20,120.)

Filed July 30, 1885.

HABEAS CORPUS—WITNESSES, DETENTION OF.

A witness who had been detained 90 days during several continuances of a cause, for which no satisfactory account is given, discharged on *habeas corpus*, in pursuance of art. 1, § 6, Const. Cal.

Department 2. Application for discharge on *habeas corpus*.

John D. Whaley, for petitioner.

John T. Dare, for respondent.

BY THE COURT. We are of opinion that the petitioner is entitled to his discharge under article 1, § 6, of the constitution, which provides that witnesses shall not be unreasonably detained. It appears that the witness has been detained as such for 90 days, and there have been several continuances in the case which are not satisfactorily accounted for.

The petitioner is discharged from custody.

CLEGHORN v. CLEGHORN. (No. 9,545.)

Filed August 3, 1885.

JUDGMENT AFFIRMED.

Judgment affirmed for failure on part of appellant to file points and authorities within proper time.

Department 1. Appeal from superior court, Tehama county.

Chipman & Garter, for appellant.

J. F. Ellison, for respondent.

By THE COURT. Appellant having failed to file her points and authorities on appeal within the time granted, we think the order should be affirmed. So ordered.

MCCAULEY v. CUNNINGHAM. (No. 9,622.)

Filed August 3, 1885.

JUDGMENT AFFIRMED.

Judgment affirmed for failure on part of appellant to file points and authorities within proper time.

Department 2. Appeal from superior court, San Joaquin county.

D. S. & S. L. Terry, for appellant.

F. T. Baldin and *J. C. Campbell*, for respondent.

By THE COURT. Appellant having failed to file her points and authorities on appeal within the time granted, we think the judgment and order should be affirmed. So ordered.

WHITMORE v. HENDERSON. (No. 8,706.)

Filed August 3, 1885.

JUDGMENT AFFIRMED.

Judgment affirmed for failure on part of appellant to file points and authorities within proper time.

Department 2. Appeal from superior court, Stanislaus county.

R. B. Treat and *W. L. Dudley*, for appellant.

W. E. Turner and *D. G. Terry*, for respondent.

By THE COURT. Appellant having failed to file his points and authorities within the time granted, we think the judgment should be affirmed. So ordered.

SUPREME COURT OF UTAH.

(4 Utah, 181)

McBRIDE v. COLLINS and another.

Filed July 25, 1885.

1. CONTRACTOR—SUBCONTRACT—ASSIGNMENT OF MONEY DUE.

A subcontractor, after having sublet part of his contract to another party at the same price he had taken it, having subsequently given him an order on the head contractor for money due for work done, it is not a matter of importance to such employer if the order fail to name a specific amount, provided such employer could not be harmed thereby, since the order is but an assignment by the subcontractor of the money due him on his contract.

2. COMPARISON OF TWO MONEY ORDERS—LEGAL CONCLUSIONS OF COURT THEREON.

Kimball & Heywood and Williams & Young, for appellants, C. W. Collins and another.

S. H. Lewis, for respondent, Ray H. McBride.

BOREMAN, J. The appellants held a contract for grading on the Oregon Short Line. They sublet a part thereof to H. A. Chaffin, and Chaffin sublet a part of his subcontract to Ray H. McBride, the respondent, the subletting to McBride being for grading from station 4,166 to station 4,205 on the 293d mile of the road. When McBride was through with his work, he applied to Chaffin for his pay. As the contract price for his work was the same as the price Chaffin was to get from appellants, Chaffin agreed to sign over to respondent the amount he (Chaffin) was to be paid for that work. At the time this matter was under consideration, Collins, one of the appellants, came up, was notified of the arrangement, assented to it, and directed that an order be drawn and it would be paid. Chaffin drew the order, accordingly, upon appellants and in favor of respondent. Collins said it was all right, and would be paid. The order was as follows:

"CHAFFIN'S CAMP, O. S. L. R. R., IDAHO, September 1, 1882.

"*C. W. Collins & Co.*: Please pay R. H. McBride for grading from station 4,166 to station 4,205 on the 293d mile of the Oregon Short Line Railroad, less \$337.37, on book acct., and oblige,
H. A. CHAFFIN."

It was agreed that by "*C. W. Collins & Co.*," in the order, the firm name of Collins & Stevens was intended. The order was duly presented to appellants, with whom it was left, and they made two payments thereon, one of \$100 and one of \$400. Afterwards Chaffin gave respondent another order, as follows:

"SALT LAKE CITY, Oct. 11, 1882.

"*Collins & Stevens*: Please keep the order that H. A. Chaffin gave to R. H. McBride, and pay to him the sum of eleven hundred and twenty-six dollars and forty-eight cents. He (McBride) agrees to be responsible for all mistakes, and make the same good.
H. A. CHAFFIN.

"C. CRISMAN, Jr., Agent."

Upon the trial a judgment was entered against the appellants for \$2,075.11, and costs. Appellants then moved for a new trial, which

was overruled, and thereupon they appealed to this court from both the judgment and the order overruling the motion for a new trial.

The principal point in this case is whether the order of September 1, 1882, was an assignment of indebtedness. Two objections are urged against the order, namely: *First*, that it is too indefinite in its terms, there being no specific amount mentioned therein; *second*, that it was not drawn upon any particular fund.

1. The order was to pay for a particular work. The amount due for such work was a question of measurement and calculation; but whether it was a small amount or a large amount, it was to pay what the appellants had agreed to pay Chaffin for that work. The specification of the amount was therefore immaterial. They were bound to pay Chaffin at a certain rate. They were, by the order, directed to pay at same rate to respondent. It was not indefinite to appellants. They knew what they had agreed to pay Chaffin. They were, by the order, simply directed to change the direction of payment. Appellants could in no way have been harmed by the failure to specify the exact sum in the order.

2. The second objection is fully met by the terms of the order. It is not drawn technically upon a particular fund, but it is drawn for a particular, clearly specified indebtedness. It is not a general order. It is not to pay out of any general indebtedness, but it is to pay a particular indebtedness over to another party. The law does not require anything more, nor are we justified by the authorities in coming to any other conclusion. Above all, it was *intended* by Chaffin and by McBride as an assignment, and the appellants were notified of this, and assented thereto, so far as they were concerned. The second order was no revocation of the first, nor was it intended so to be by the parties, nor understood so to be by the appellants, so far as we are able to discover from the testimony. We see no reason for disturbing the action of the court below. The judgment and order of the court below are affirmed.

ZANE, C. J., and POWERS, J., concur.

(4 Utah, 112)

PEOPLE v. FENNEL, impleaded, etc.

Filed July 25, 1885.

1. PRACTICE—SUPREME COURT—JURISDICTION—RECORD.

In criminal cases the supreme court must learn from the record, and not from extraneous matters, whether it has jurisdiction or not.

2. SAME—PERFECTING APPEAL AFTER DISMISSAL OF FORMER APPEAL.

After an appeal has been dismissed out of court a party cannot come back and ask to be allowed to send to the court below and perfect his appeal.

On rehearing. See former opinion, *ante*, 525.

Arthur Brown and E. B. Critchlow, for appellant, Daniel Fennel, impleaded, etc.

W. H. Dickson, for the People.

BOREMAN, J. The appeal in this case having been dismissed at the present term, the appellant petitions for a rehearing. The petition refers the court to an unreported case of *Campbell v. Taylor*, decided when neither of the present members of the court were on the bench, and refers also to the case of *McLelland v. Dickinson*, 2 Utah, 100. In neither of these cases did the questions raised go to the jurisdiction of the court. It is well settled, by long practice and repeated decisions, that in criminal cases the court must learn from the record, and not from extraneous matters, whether it has jurisdiction or not. *People v. Clark*, 49 Cal. 455. The alleged harshness of the rule was duly considered, but that is not to control where the rule is one of long standing and well known to the bar.

But the petitioner further asks that he may now be allowed to make proof of service in the lower court, and have the same certified up by the clerk and added to the transcript. No reason is offered why this request was not made at the hearing of the motion to dismiss the appeal. It is a late day, after an appeal has been dismissed out of court, for a party to come back again and ask to be allowed to send to the court below and perfect his appeal. That is something he should have thought of before the motion to dismiss the appeal was disposed of. The court cannot consent that a party may sit by and wait until the motion is decided against him, and then make his request. By such a practice a case would be almost endless in its career. Whether the request would have been granted or not if it had been made at the proper time, it is not necessary now to consider. It is sufficient to say that it was not made, and no reason is given why it was not made. A rehearing will not be granted in any case except for strong reasons, but in this petition nothing is urged that was not fully available upon the former hearing.

The petition for rehearing is denied.

ZANE, C. J., concurs. POWERS, J., expresses no opinion.

SUPREME COURT OF NEVADA.

(19 Nev. 162)

STATE v. NEVIN.

Filed July 25, 1885.

1. OFFICIAL BOND—FAITHFUL PERFORMANCE OF DUTY—WHAT WORDS IMPLY.

A bond requiring a faithful performance of official duty is as binding upon the principal and his surety as if all the statutory duties of the officer were inserted in the bond.

2. COUNTY TREASURER—OBLIGATION TO SAFELY KEEP FUNDS.

Under the several provisions of the laws of Nevada it is the duty of the county treasurers to safely keep the public money, and pay it out only as provided by law.

3. SAME—MONEY STOLEN FROM TREASURER.

A robbery committed upon the funds in the hands of the county treasurer renders such treasurer and his sureties liable on his bond for the amount stolen.

Appeal from a judgment of the First judicial district court, Storey county, entered in favor of the plaintiff.

W. E. F. Deal and *Wm. Woodburn*, for appellant.

W. H. Davenport, Atty. Gen., and *J. A. Stephens*, Dist. Atty., for respondent.

HAWLEY, J. This action was brought against the county treasurer of Storey county, and the sureties upon his official bonds, to recover an amount of money admitted to be deficient in the accounts of the county treasurer. The answer alleges that the money was forcibly taken by robbers from the treasurer and carried away by irresistible force, "without any fault or negligence, or want of reasonable care or diligence in the preservation and care of said sum of money, so that said sum of money was entirely lost to the treasury of said county, and no part thereof has ever been recovered." The district court sustained a demurrer, which was interposed to this answer, upon the ground that the facts stated did not constitute any defense to the cause of action.

Was this ruling of the court correct? The condition named in the official bonds "is such that if the above-bounden Dennis Nevin shall well and truly and faithfully perform and execute the duties of treasurer of the county of Storey now required of him by law, and shall well, truly, and faithfully execute and perform all the duties of such office of treasurer required by any law to be enacted subsequently to the execution of this bond, then this obligation to be void and of no effect, otherwise to be and remain in full force and effect." Appellant insists that his responsibility under this contract is simply that which the common law imposes upon a bailee for hire; that he is not in any sense an insurer of the moneys in his custody, and should not be held responsible for the money that was stolen from

him, and taken by the use of irresistible force, without any negligence or fault or want of care on his part. The great weight of the authorities upon this subject are adverse to the views contended for by appellant. The general rule upon this subject is to the effect that public officers who are intrusted with public funds, and required to give bonds for the faithful discharge of their official duties, are not mere bailees of the money, to be exonerated by the exercise of ordinary care and diligence; that their liability is fixed by their bond; and that the fact that money is stolen from them without any fault or negligence upon their part, does not release them from liability on their official bonds.

Recognizing the almost universality of this rule, appellant contends that the decisions against him are founded upon the peculiar wording of the bonds, or provisions of the statute, to the effect that the officer shall *safely keep* and *pay over* all moneys coming into his hands. It is true that in *U. S. v. Prescott*, 3 How. 588; *Com. v. Comly*, 3 Pa. St. 374; *State v. Harper*, 6 Ohio St. 610; *Inhabitants of Hancock v. Hazzard*, 12 Cush. 112, and other cases, considerable stress is placed upon this language in the bond. Thus, in *U. S. v. Prescott*, the court said:

"The condition of the bond has been broken, as the defendant Prescott failed to pay over the money received by him when required to do so; and the question is whether he shall be exonerated from the condition of his bond, on the ground that the money had been stolen from him. The objection to this defense is that it is not within the condition of the bond, and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government. How, then, can Prescott be discharged from his bond? He knew the extent of his obligation when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability contrary to his own express undertaking? There is no principle upon which such a defense can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond."

But there are an equal or greater number of cases, like *Muzzy v. Shattuck*, 1 Denio, 233; *District Tp. v. Morton*, 37 Iowa, 550; *Inhabitants v. McEachron*, 33 N. J. Law, 340; *Boyden v. U. S.* 13 Wall. 17; and *State v. Moore*, 74 Mo. 413, where the condition of the bond, like the one under consideration here, is for the faithful performance of the official duties, and the conclusions of the courts are substantially the same as announced in *U. S. v. Prescott*. It is apparent that a bond requiring a faithful performance of official duty is as binding upon the principal and his sureties as if all the statutory duties of the officer were inserted in the bond.

In Indiana the statutory conditions in the bond are the same as required by the laws of this state. In *Halbert v. State*, 22 Ind. 130, the treasurer's bond was, however, conditioned, not only for the faithful performance of his duties as the statute required, but also that he

should "pay over all moneys according to law that might come into his hands as such treasurer." The court said:

"It is objected that the latter branch of the condition was unauthorized by law, and therefore of no effect. But if the condition for the faithful performance of his duties includes the paying over according to law of all moneys that might come into his hands as such treasurer, nothing is added to the legal effect of the bond by the latter branch of the condition. An examination of the various statutes bearing on the question shows clearly enough that one of the duties of a county treasurer is to pay over according to law all moneys that came into his hands as such treasurer; hence we shall consider the case as if the bond had been conditioned simply for the faithful performance of the duties of the office."

in *Boyden v. U. S.* 13 Wall. 24, the court, referring to *U. S. v. Prescott*, said:

"The condition of the receiver's bond in that case, it is true, was that the receiver should pay promptly when orders for payment should be received; while the bond in the case before us is conditioned that Boyden, the receiver, had truly executed and discharged, and should continue truly and faithfully to execute and discharge, all the duties of said office according to law. But the acts of congress respecting receivers made it their duty to pay the public money received by them when ordered by the treasury department. * * * The bond, therefore, was an absolute obligation to pay the money, and differing not at all, in legal effect, from the bond in *Prescott's Case*."

What are the duties of a county treasurer under the statutes of this state? In addition to requiring an oath and an official bond, it is, among things, provided that the county treasurer—

"Shall receive all moneys due and accruing to his county, and disburse the same on the proper orders issued and attested by the county auditor." 2 Comp. Laws, 2981. "He shall so arrange and keep his books that the amount received and paid out * * * shall be exhibited in separate accounts, as well as the whole receipts and expenditures by one general account." 2 Comp. Laws, 2984. "He shall, at all times, keep his books and office subject to the inspection and examination of the board of county commissioners, and shall exhibit the money in his office to such board at least once a year, and as often as such board may require." 2 Comp. Laws, 2985. "He shall annually make complete settlements with the board of county commissioners, * * * and shall, at the expiration of his term of office, deliver to his successor all public moneys, books, and papers in his possession." 2 Comp. Laws, 2991.

He shall assist the county auditor and county commissioners in counting the money in his office, so that they may "determine whether the funds, securities, and property of the county are all on hand." St. 1881, 21. Under these provisions is it not manifest that it is the duty of county treasurers to safely keep the public money and pay it out only as provided by law? The fact that the county treasurer is required "to receive money, and enter it in his cash-book, implies, without any other special regulation, that he is to keep it; and, being required to keep it, it follows that he is to keep it safely. This is one of the duties of his office he has undertaken faithfully to discharge." *Thompson v. Trustees*, 30 Ill. 101. Unless he safely keeps

it he could not exhibit it to the commissioners as required by law, and it could not be counted. Neither could he deliver it to his successor in office. The duty to safely keep the money is made absolutely clear by the provisions of the statute already quoted and referred to. But there are also other provisions which are equally as strong and cogent. If any officer *charged* with the *safe-keeping* of public money converts the same to his own use, or loans any portion of such money, he shall be guilty of embezzlement. St. 1881, 82; St. 1883, 96. Could a county treasurer who converts the money to his own use claim that he is not an officer who is charged with the safe-keeping of the public money? It would be a stigma upon the law and a disgrace to the judiciary to say that he could successfully maintain such a defense. The statutes of this state in relation to the duties of county treasurers are almost identical with those of Indiana. The supreme court of that state in *Halbert v. State*, *supra*, after quoting the statutory provision, said: "By these various provisions it is clearly seen that it is the duty of a county treasurer to pay over the funds in his hands according to law, which may be upon orders drawn upon him by the auditor, or to his successor in office, and a failure to make such payment constitutes a breach in his bond, conditioned for the faithful performance of his duties," and declare that the fact that the money was stolen from the treasurer without his fault did not relieve him from the necessity of discharging the obligation imposed upon him by his bond. This decision was followed in the subsequent cases of *Morbeck v. State*, 28 Ind. 86; *Röck v. Stinger*, 36 Ind. 348, and *Linville v. Leininger*, 72 Ind. 494.

In Iowa, where the statute is not as strong as in this state, the same doctrine is held and applied to an officer upon a bond conditioned for the performance of his duties "to the best of his ability." *District Tp. v. Smith*, 39 Iowa, 9. The statutes of this state are more stringent than the statutes of Ohio, except in relation to the conditions of the bond. In *State v. Harper*, 6 Ohio St. 610, the court said:

"By accepting the office, the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law. His bond is a contract that he will not fail, upon any account, to do those acts. It is, in effect, an insurance against the delinquencies of himself, and against the faults and wrong of others, in regard to the trust placed in his hands. He voluntarily takes upon himself the risks incident to the office, and to the custody and disbursement of the money. Hence it is not a sufficient answer, when sued for a balance found to have passed into his hands, to say that it was stolen from him; for, even if the larceny of the money be shown to be without his fault, still, by the terms of the law and of his contract, he is bound to make good any deficiency which may occur in the funds which come under his charge."

We deem it unnecessary, upon this branch of the case, to specially refer to the numerous other authorities where the same doctrines are announced, as it is absolutely clear, from those already cited, that the distinction sought to be maintained by appellant, that the condi-

tions of the bond and the provisions of the statute of this state should be construed differently from the construction given in the decided cases, cannot be maintained. In many of the cases the courts have given as an additional reason for their conclusions that a public officer cannot set up the defense of a robbery of the public funds in their possession. Thus, in *U. S. v. Prescott*, *supra*, Justice McLEAN, in delivering the opinion of the court, said:

"The liability of the defendant, Prescott, arises out of his official bond, and principles founded upon public policy."

After discussing Prescott's liability upon the bond, he adds:

"Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public?"

In *Com. v. Comly*, *supra*, GIBSON, C. J., in delivering the opinion of the court, said:

"The opinion of the court in the case of *U. S. v. Prescott* is founded on sound policy and sound law. * * * The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant."

To the same effect are the decisions in *District Tp. v. Morton*, 37 Iowa, 553; *U. S. v. Watts*, 1 N. Mex. 562; *Commissioners Jefferson Co. v. Lineberger*, 3 Mont. 241. The only defenses recognized by any of the authorities in the United States at the present time, with the exception of *Cumberland Co. v. Pennell*, 69 Me. 357, for the failure of a public officer charged with the safe-keeping of the public funds to pay over the same, is where he is prevented from doing so by the act of God or the public enemy, without any neglect or fault on his part. We say the Maine case stands alone in its opposition to what it is pleased to term the new-born policy of the law. In that case some reliance seems to have been placed upon the case of *Albany v. Dorr*, 25 Wend. 440, but the principles of that case were repudiated in *Muzzy v. Shattuck*, *supra*, and hence we are authorized to say that the case in Maine is unsustained by any other recognized authority in any of the courts of the United States, federal or state.

In *U. S. v. Thomas*, 15 Wall. 341, it was held that the act of a public enemy in forcibly seizing or destroying property in the hands of a public officer, against his will, and without his fault, is a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty, and to have the property forthcoming when required. BRADLEY, J., in delivering the

opinion of the court, questions the correctness of some of the extreme views stated in some of the authorities referred to, and claims that broader language was used than was necessary where the defense set up was that the money was stolen, and says that "a much more limited responsibility" than was indicated by the language in *Prescott's Case* "would have sufficed to render that defense nugatory." But there is no declaration of any legal principle contained in this opinion that would justify a court in permitting such a defense as was sought to be interposed in this case. It is said that public officers are bailees, "but they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility."

In *U. S. v. Humason*, 6 Sawy. 201, the court permitted the defense that the officer with the money was on a steam-ship which was lost at sea, and the officer drowned and the money lost in the Pacific ocean. The doctrines announced in that case are similar to the case of *U. S. v. Thomas*, and do not in any manner militate against the general views we have expressed.

In *State v. Moore*, the defendant, who was county treasurer, answered that he ought not to be held upon his bond because Mississippi county, "being overrun with tramps, thieves, robbers, public enemies, the money could not be safely kept in said county," and that, for the purpose of keeping it safely, he deposited it to his credit, as treasurer, in a bank in St. Louis, which failed, whereby the money was wholly lost. The court said:

"Such an answer as this, we think, is insufficient to shield defendant from liability, in any view which can be taken of the case. If the obligation assumed by defendant in his bond, to deliver over to his successor in office all money belonging to the county, can only be met or discharged by making such delivery or payment, it is clear that the facts set up in the answer, and admitted to be true, constitute no defense. That the above rule is the correct one, governing in such cases, is established by the following authorities:" (Citing *State v. Powell*, 67 Mo. 395, and the various decisions of the supreme court of the United States.) "If, on the other hand, under the rule laid down in the case of *U. S. v. Thomas*, 15 Wall. 337, defendant is to be regarded as a bailee, and exempt from liability to pay when the loss is occasioned by the act of God or a public enemy, he would still be liable, under the facts stated in the answer, because they show that the loss was not occasioned in either of these ways. The tramps, thieves, and robbers which it is alleged overrun Mississippi county, while they are enemies to the peace and safety of the public and social order, they are not public enemies in the legal sense of these words. By enemies is to be understood public enemies with whom the nation is itself at open war; and not merely robbers, thieves, and other private depredators, however much they may be deemed, in a moral sense, at war with society. Losses, therefore, which are occasioned by robbery on the highway, or by the depredations of mobs, rioters, insurgents, and other felons, are not deemed losses by enemies within the meaning of the exception." 74 Mo. 417.

The action of the district court in sustaining the demurrer to the answer was correct.

The other positions taken by appellant relative to the time when the cause of action could be commenced are wholly untenable. Having admitted the defalcation, and claimed the right to interpose the defense inserted in his answer, the state was not compelled to wait until the close of appellant's term of office before commencing an action upon his bond.

The judgment of the district court is affirmed.

SUPREME COURT OF CALIFORNIA.

(67 Cal. 223)

FISHER v. SWEET. (No. 9,552.)

Filed July 28, 1885.

1. PARTNERSHIP—ACCOUNTING—ACTION FOR.

Until there has been an accounting between partners, one of them cannot, in an action at law, sue to recover of the other his proportion of the partnership adventures.

2. DISBURSEMENTS OF PARTNERSHIP—EVIDENCE OF.

Where, in an action, plaintiff offers evidence to show that defendant had received moneys growing out of adventures of plaintiff and defendant, whether as joint owners or as copartners, the defendant is entitled to show that such moneys were disbursed in due course of business.

Department 2. Appeal from superior court, Tulare county.

Brown & Daggett and Atwell & Bradley, for appellant.

Bennett & Wigginton and T. M. McNamara, for respondent.

MYRIOK, J. The rulings in this case appear to have been consistent with the theory of the case adopted by the court; but we think that theory incorrect. The complaint is for money had and received, and for services; the plaintiff averring that he and defendant were the owners of certain lands, and that said lands were farmed and ultimately sold, and defendant having received the proceeds thereof, and the proceeds of certain individual property of plaintiff, had failed to pay to the plaintiff his proportion, as well as compensation for his services in and about the farming of the lands. The defendant, after denying the receipt by him of the proceeds of sales, averred a partnership between himself and plaintiff, and that all the transactions concerning the said lands, and the crops thereof, were partnership transactions, and that there had been no final settlement of such partnership affairs.

We are of opinion that the plaintiff's evidence shows the existence of a partnership between plaintiff and defendant as to the lands purchased by them, and as to farming the same, and that plaintiff cannot recover in an action at law; at least, until the accounts have been settled.

We are also of opinion that in an action at law or in equity, if plaintiff offered evidence tending to show that defendant had received moneys growing out of their adventures, (whether as joint owners or as co-partners,) the defendant would be entitled to show that such moneys had been disbursed in the due course of the business; and that, whether the disbursement had been by the defendant in person, or by the mercantile firm of which he was a member.

It is not necessary to point out each particular ruling, and show its error; it is sufficient to say that the case was tried upon a wrong theory. There should have been an accounting between the parties. It was not necessary to have made the members of the firm of Sweet & Co.

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parties to this action; they had no interest in the partnership affairs as such; they were, as to plaintiff and defendant, merely factors, agents, account-keepers. Payments made by Sweet & Co., in and about the business of plaintiff and defendant as such factors and agents, should certainly be taken into account in adjusting the affairs of plaintiff and defendant. How else could equity—even common justice—be done between them?

In the action before us, the only recovery which could be had by plaintiff would be of moneys received by defendant as proceeds of the individual property of plaintiff; and as to such moneys, the court erred in not permitting defendant to show the direction in which those moneys had been disbursed.

Judgment and order reversed, and cause remanded.

We concur: THORNTON, J.; SHARPSTEIN, J.

(87 Cal. 221)

CREIGHTON v. KAWEAH CANAL & IRR. CO. (No. 9,702.)

Filed July 28, 1885.

RIPARIAN RIGHTS—DIVERSION OF WATER, WHEN RESTRAINED.

Diversion of water will not be restrained at suit of owner of land situate on the water-course, unless such diversion diminishes the quantity of water which would otherwise have flowed therein by a natural channel.

Department 2. Appeal from superior court, Tulare county.

Brown & Daggett, for appellant.

Atwell & Bradley, for respondent.

MYRICK, J. Action to restrain the diversion of water. The plaintiff is the owner of land located on a water-course called "Bates' Slough." The defendant uses a portion of the channel of Deep creek (another water-course) as a portion of its ditch, and placed a dam across Deep creek, at a point where, it is claimed by plaintiff, the waters thereof would flow into Bates' slough, and by means of such dam caused the waters to be turned into its ditch, thus preventing the water from flowing into Bates' slough. We are not agreed upon the proposition that the evidence shows the existence of a natural water-course from Deep creek to Bates' slough; nor are we agreed that the findings establish the existence of such natural water-course. There is no doubt that a channel now exists and has existed there since the digging of the reclamation ditch, about 1870; but the doubt relates to the existence of a well-defined natural water-course prior to the digging of the reclamation ditch. We are, however, agreed upon a proposition on which the judgment will have to be reversed. The defendant was restrained from "maintaining or keeping any dam in the cut or channel leading from Deep creek into Bates' slough, or in Deep creek, or in any manner interfering with or obstructing the free flow of the waters in said Deep creek, or in said cut or channel, or into said Bates' slough, or diverting any water from either of the same."

There is no evidence to show a *continuous* flow of water in a natural channel from Deep creek to Bates' slough; the most the evidence tends to show is that at high water, during spring freshets, in some years, water flowed in a depression to Bates' slough. At best, the plaintiff would be entitled only to have the defendant enjoined from obstructing the flow of that which would have *naturally* flowed, unaided by artificial means with which he (the plaintiff) is not connected. If there was a natural water-course from Deep creek to Bates' slough, through which water flowed, say for two months in the year, and say to the amount of 100 inches, and if the defendant uses the channel of Deep creek as a portion of its ditch, it will not be restrained from taking its water out of the channel of Deep creek, unless such taking out diminishes the *quantity* which would otherwise have flowed by a *natural channel* into Bates' slough, and shortens the period of the natural flow; and it will be restrained only as to such quantity and period.

Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

(67 Cal. 226)

FLEMING v. ALBECK. (No. 9,729.)

Filed July 28, 1885.

1. PRACTICE—COMPLAINT—GENERAL DEMURRER.

A general demurrer addressed to the whole complaint is properly overruled, if in a part of the complaint a cause of action is stated.

2. ERROR AS TO ADMISSION OF EVIDENCE—SPECIFICATIONS, HOW MADE.

Where exceptions are taken to the admission or rejection of evidence, the specifications of the errors, on appeal, should refer to the testimony as it appears in the transcript, in such a way that the court may identify the exception reserved; and unless they are so set forth they will be disregarded.

3. LIBEL—DAMAGES, EVIDENCE OF—JURY TO FIX AMOUNT.

In a suit for libel, where there is no allegation of special damage, a witness cannot testify as to his opinion of what would be a fair compensation for plaintiff's damages; and in such case the jury will fix the amount of damages.

Department 2. Appeal from superior court, Merced county.

Ostrander & Knox, for appellant.

Bennett & Wigginton, for respondent.

MYRICK, J. Action for libel. The alleged libel consists in the publication of a card, in which the plaintiff was charged with having accused the defendant of setting fire to his (the defendant's) building. The card also contained a letter. At the foot of the letter occurs the following: "I wonder if the under-sheriff, C. E. Fleming, has caused some one to send the above epistle to me?" The complaint was demurred to, which demurrer was overruled. This ruling was correct, because the demurrer was general, addressed to the whole complaint; and as in a portion of the complaint a cause of action was stated, a general demurrer was properly overruled.

Many erroneous rulings in regard to evidence appear in the tran-

script, which cannot be ground for reversal, for the reason that the statement does not comply with the statute as to the specification of errors. We quote one specification as a sample of many others: "The court erred in overruling defendant's objection to question put by plaintiff's counsel to witness H. W French, marked in the foregoing statement 'Exception No. 1,' and found in lines 10 and 23, page 10." Three other specifications, in similar language,—the exceptions numbered 2, 3, and 4, respectively,—refer to the same witness, and a page and line are stated as to each. On looking through the transcript we find no exception numbered or marked, and at the pages indicated we find nothing relating to the points endeavored to be presented. In only one instance out of ten does the specification tend to point out the error, and that is in reference to the witness Howell, and because but one exception appears in connection with his examination. For that reason we can notice that exception, although the place where found is not correctly given, and it is not numbered. The witness was asked what, in his opinion, would be the fair amount of money in compensation for plaintiff's damages. This was error. No special damage was averred in the complaint, nor cause for special damage stated; therefore, the jury and not the witness was to say what damage had been sustained.

As the case goes back for a new trial, we will say that the letter contained in the card as published is not libelous without an *innuendo*, and should have been distinguished from that part of the card which was libelous.

Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

(2 Cal. Unrep. 490)

In re LING.

Filed July 29, 1885.

APPEAL.—BILL OF EXCEPTIONS—NECESSITY FOR.

Where the whole case appears on the record, no bill of exceptions is requisite; the purpose of the bill of exceptions being to place on the record that which, without it, would not so appear.

Department 2. Application to supreme court for settlement of bill of exceptions, in a proceeding for removal of a civil officer

W. Smith, for petitioner.

By THE COURT. In this proceeding, as the whole case appears on the record, there is no bill of exceptions requisite. A bill of exceptions is only necessary to place that on the record which, without it, does not go on the record. In this case the action of the court can be reviewed on the transcript of the record of the case in the court below, on an appeal from the judgment of dismissal.

The application is denied.

(57 Cal. 249)

SCOLLAY v. BUTTE Co. (No. 9,701.)

Filed July 30, 1885.

COUNTIES—POWER OF—DELEGATION OF—CONTRACTS ULTRA VIRES.

While counties have power under the statute (Pol. Code Cal. §§ 4001-4003, 4046) to contract for the collection of the county property, the board of supervisors, in the exercise of such power, is not authorized to delegate it to others to determine whether to commence a suit, and to select attorneys and prosecute the same, nor to make a compromise or settlement dependent on the written consent of strangers; and contracts so attempting to delegate such powers are *ultra vires*.

Department 1. Appeal from superior court, Butte county.

Wm. M. Pierson and H. C. Newhall, for appellant.

I. S. Belcher, John C. Gray, L. C. Granger, C. F. Lott, and A. F. Jones, for respondent.

McKEE, J. In the year 1876 Butte county was the owner and holder of 200 railroad bonds of the California Northern Railroad Company, secured by mortgage, the principal and interest of which had become due and payable; but the company would not pay, and the county was desirous of collecting them. Under those circumstances, two persons—W. S. Watson and William Corcoran—proposed to the board of supervisors of the county that they would collect them, without attorney's fees, expenses, or costs to the county, for 50 cents on the dollar. The board accepted the proposal, and on the third of October, 1876, a written contract to that effect was drawn and signed by the chairman of the board in the name of the county, and by Watson and Corcoran; and the contract, thus signed, was ratified by the board. By the terms of the contract the bonds were to be delivered to Watson and Corcoran for collection. They were to commence within 60 days "proceedings" or "negotiations" or "a proper suit" for their collection, and "prosecute the matter without any unnecessary delay," without costs or charges, or attorney's fees, and when collected retain to their own use 50 per cent. of the amount collected, "in full payment of themselves, their agents, attorneys, and employes employed or engaged in the matter." It was also "mutually understood and agreed that either of the parties hereto may compromise the matter of paying said bonds with said railroad company, upon such terms and conditions as they may deem just and equitable, but no compromise so made shall be final or binding without the express written consent of the parties hereto."

On the second of December, 1876, foreclosure proceedings upon the bonds and mortgage were commenced against the railroad company. These were continued for about seven years, without other result than the recovery of a final judgment for the principal and interest due upon the bonds, but for the execution of this judgment, so far as appears from the complaint, no steps were taken; and under these circumstances the board of supervisors of the county, on the fifteenth of May, 1883, compromised and settled with the railroad

company, without the consent, written or otherwise, of Watson and Corcoran, and received from the company \$20,000, which it accepted in full satisfaction of the bonds and release of the mortgage. It is alleged that "when this settlement was made there was due and payable on said bonds the sum of \$47,058.80, which could and would have been collected and received by the county but for the unauthorized compromise and settlement by the board." Five months after this settlement Watson and Corcoran assigned the contract to the plaintiff and appellant, who presented a claim to the board of supervisors for \$23,329.40, due upon said contract. The claim was rejected, and hence this suit. The answer of the county to the complaint is that the contract was *ultra vires*. When the contract was made, the powers of the several counties of the state, as defined by the legislature, were contained in the following sections of the Political Code:

"Sec. 4000. Every county is a body politic and corporate, and as such has the powers specified in this Code, or in special statutes, and such powers as are necessarily implied from those expressed.

"Sec. 4001. Its powers can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law.

"Sec. 4003. It has power: (1) To sue and be sued. (3) To make such contracts, and purchase and hold such personal property, as may be necessary to the exercise of its powers. (4) To make such orders for the disposition or use of property as the interests of its inhabitants require."

And the board of supervisors, as agents of the county, were clothed with the following jurisdictions and powers:

"Sec. 4046. The boards of supervisors, in their respective counties, have jurisdiction and power, under such limitations and restrictions as are prescribed by law: (8) To purchase, receive by donation, or lease, any real or personal property necessary for the use of the county; preserve, take care of, manage, and control the same. (10) To sell at public auction at the courthouse door, after thirty days' previous notice, * * * to the highest bidder, for cash, any property, real or personal, belonging to the county. (15) To direct and control the prosecution and defense of all suits to which the county is a party. (26) To do and perform all other acts and things required by law, not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government," etc.

These provisions constituted the charter of the county upon the subjects to which they relate; and, for the declared purposes and objects within its jurisdiction, the board could exercise the powers expressly granted to it, and those which were necessarily or fairly implied in or incident to them. Railroad bonds belonging to a county are property upon which the county may sue, and about which the board of supervisors may make such orders as it may deem best for the interests of the county, with reference to the use or disposition of the same, in the mode prescribed for the exercise of its powers. No orders were made for the sale of the bonds in the mode prescribed by subdivision 10 of section 4046, *supra*. The contract was for their

collection by negotiations or other proceedings, or by suit. No question is made as to the power of the county to sue. Such a power implies the power to employ an agent to commence and prosecute a suit, unless the law itself has provided for an officer whose duty it is to commence and prosecute suits for the county. Such an officer has been provided in the district attorney, whose duty it is, as the legal adviser of the county, " * * * to defend all suits brought against * * * his county, and prosecute * * * all actions for the recovery of debts, fines, penalties, and forfeitures accruing to * * * his county;" and to collect and receipt for the same in his official capacity. Subs. 3, 4, § 4256, Pol. Code.

In *Hornblower v. Duden*, 35 Cal. 664, it was held, upon the authority of *Smith v. Mayor of Sacramento*, 13 Cal. 533, that, while the power to employ other counsel than the district attorney to commence and prosecute suits for the county was not expressly conferred on the board of supervisors, it was obviously embraced in the general power to do and perform all such other acts and things as may be strictly necessary to the full discharge of the powers and jurisdiction conferred on the board, and in the power to control the prosecution and defense of all suits to which the county is a party.

Accepting that as a correct rendition of the powers conferred on the board of supervisors, in respect to the prosecution and defense of suits to which the county may be a party, the contract under consideration is not of that character. The plaintiff does not allege that his assignors were attorneys or counselors at law, or that they or the board of supervisors contracted for legal services to be rendered by them in connection with or independent of the district attorney. The subject-matter of the action was the collection of choses in action which belonged to the county. Without obtaining any order or instructions from the board to sue, the contracting parties agreed "to commence a proper suit or proceeding or negotiation for the collection of the amount due upon said bonds, within 60 days from date, and to faithfully and diligently prosecute the same until a final judgment or settlement, without any cost or charge to the county; * * * and to accept in full for all services to be rendered by them, or attorneys they may employ in the matter, the sum of 50 per cent. upon each and every dollar so collected by them of the amounts due upon said bonds," etc.

It may be conceded that the board of supervisors had power to contract for the collection of the property of the county; but in the exercise of that power it had no authority to delegate to others, whom it employed for that purpose, the power to determine whether to commence a suit in the name of the county, and to select and employ attorneys to commence and prosecute such a suit; nor to abdicate its control of the prosecution of such a suit, or to make its compromise or settlement dependent upon the written consent of strangers. The commencement of a lawsuit, the selection and employment of attor-

neys to commence and prosecute it, and the compromise and settlement of the same, are acts which involve the exercise of judgment and discretion; and it is well settled that powers conferred upon a municipal corporation to do such acts cannot be delegated to others. Such powers are in the nature of public trusts conferred upon the corporation for the public benefit, and cannot be vicariously exercised. *Cooley*, Const. Lim. 204. Hence the contract in suit was *ultra vires*, and the court below properly sustained the demurrer. Judgment affirmed.

We concur: Ross, J.; McKINSTRY, J.

(67 Cal. 288)

Estate of HILL, Deceased. (No. 8,538.)

Filed July 30, 1885.

1. SURETIES—RIGHTS AGAINST PRINCIPAL ON PAYMENT OF DEBT.

Sureties who have paid the principal's debt may recover of the principal the amount paid, or, if he be not living, may enforce a claim against his estate therefor.

2. SURETIES—JUDGMENT AGAINST—WHETHER CLAIM AGAINST PRINCIPAL'S ESTATE.

Sureties against whom judgment has been recovered for amount of defalcation of principal, a public officer, have no enforceable demand against the principal's estate after his death, until such judgment has been paid by them.

3. ADMINISTRATOR—INTEREST IN CLAIM AS DISQUALIFICATION TO ACT THEREON.

Where an administrator is personally interested in a claim against his intestate's estate, he is disqualified from acting thereon.

4. MINORS—ESTOPPEL TO DISPUTE ADMINISTRATOR'S ACCOUNT.

Proceedings in a probate court for sale of decedent's real property to pay an alleged false claim will not operate as an estoppel of the heirs of decedent to dispute the correctness of the administrator's account as to such claim.

Department 1. Appeal from superior court, Fresno county.

H. S. Dixon and *D. S. Terry*, for appellants.

Sayle & Harris and *Bennett & Wigginton*, for respondents.

McKEE, J. This is an appeal by the heirs at law and distributees of the estate of W. W. Hill, deceased, from a judgment settling and allowing the final account of the administrator of the estate, and from an order denying a new trial. The principal question for adjudication arises out of a claim against the estate for \$40,627. The claim was presented to the administrator on the ninth of May, 1877, for allowance or rejection, and was allowed by the administrator and approved by the probate judge on the same day. In the course of administration payments were made upon it, from time to time, which the superior court, sitting as a court of probate, approved and credited the administrator with in the settlement of his final account. This approval and settlement, it is contended, were erroneous, because the claim was one in which the administrator was personally interested, which was not chargeable against the estate, and its allowance and the payments thereon were fraudulent and void.

The basis of the claim is an official bond given by W. W. Hill in his life-time as treasurer of Fresno county. While in office, Hill died, intestate, on the third of February, 1874. After his death, the county, having discovered that he was, at the time of his death, short in his accounts to the extent of \$56,000, commenced an action against the sureties upon his official bond, to recover the amount of his defalcation. The action was commenced on the thirtieth of July, 1874, and on the sixth of December, 1875, judgment was entered therein against the sureties upon the bond, for the amounts of their respective obligations, for which each was adjudged liable, as follows, namely: Against A. H. Burrough, for \$1,000 and costs; F. B. Duff, \$1,000 and costs; Frank Dusy, \$500 and costs; William Faymonville, \$1,500 and costs; J. C. Hoxie, \$2,000 and costs; William Ingram, \$2,000 and costs; E. Jacob, \$2,000 and costs; Joseph Kincaid, \$500 and costs; Alexander Kennedy, \$2,000 and costs; J. P. Lane, \$1,000 and costs; W. S. Powell, \$2,500 and costs; Jonathan Rea, \$5,000 and costs; T. W. Simpson, \$2,000 and costs; J. G. Simpson, \$1,000 and costs; John Sutherland, \$20,000 and costs; A. H. Statham, \$5,000 and costs; and Justin Esery, \$5,000 and costs. On appeal the judgment was affirmed by the supreme court, and the *remittitur* was filed in the district court on the ninth of April, 1877.

A. H. Statham, one of the sureties upon the bond, against whom judgment was rendered for \$5,000 and costs, was the duly-qualified administrator of the estate. Notice to creditors of the estate to present their claims within 10 months, as required by law, had been duly given by publication of notice, commencing on the eleventh of March, 1874, and ending on the eighth of April, 1874. No claim upon the bond against the estate was ever presented by the county. To the action commenced against the sureties on the bond, the estate was not made a party. The action was commenced and prosecuted to judgment against the sureties only; and, after the judgment was affirmed by the supreme court, three of the sureties on the bond, namely, Sutherland, Esery, and Morrow, claiming to act for themselves, and as "trustees and attorneys in fact" for the other sureties, including Statham, who was also administrator of the estate, made out and presented to the administrator a claim in substance as follows:

"Estate of W. W. Hill, deceased, Dr. to Justin Esery, T. W. Simpson, J. C. Hoxie, Alexander Kennedy, F. B. Duff, Jonathan Rea, J. P. Lane, Frank Dusy, W. S. Powell, Wm. Ingram, J. G. Simpson, Wm. Faymonville, John Sutherland, Elias Jacob, M. J. Church, A. H. Statham, Henry Burrough, Joseph Kincaid, and Jesse Morrow, \$40,627.27, for the amount of a judgment recovered on the sixth of December, 1875, by the county of Fresno against them as sureties upon the official bond of W. W. Hill, late treasurer of said county, for defalcation in office, and affirmed, on appeal to the supreme court, the twenty-seventh day of January, 1877; the *remittitur* from said court being filed in the court in which the judgment was rendered, on the ninth of April, 1877; which judgment said claimants are compelled to pay on account of the defalcation of said W. W. Hill, deceased, their principal in said bond."

The claim was supported by the following affidavit:

"*State of California, County of Fresno.* Jesse Morrow, Justin Esery, and John Sutherland, Sr., for themselves, and as the attorneys in fact for T. W. Simpson, J. C. Hoxie, Alex. Kennedy, F. B. Duff, Jonathan Rea, J. P. Lane, Frank Dusy, W. S. Powell, William Ingram, J. G. Simpson, William Faymonville, Elias Jacob, M. J. Church, A. H. Statham, Henry Burrough, Joseph Kincaid, whose foregoing claim is herewith presented to A. H. Statham, the administrator of the estate of said deceased, being duly sworn, says, each for himself, and not one for the other, that the amount thereof, to-wit, the sum of \$40,627.27 in gold coin is justly due to said claimants; that no payments have been made thereon which are not credited; and that there are no offsets to the same, to the knowledge of said Justin Esery, Jesse Morrow, and Jonathan Sutherland.

[Signed]

"JESSE MORROW.

"JOHN SUTHERLAND, Sr.

"JUSTIN ESERY.

"Subscribed and sworn to before me this ninth day of May, A. D. 1877.

[Signed]

"C. G. SAYLE,

[Notarial Seal]

"Notary Public."

Thus supported, the claim was presented and indorsed as follows:

"No. 81. Probate Court, Fresno County. In the Matter of the Estate of W. W. Hill, Deceased. Claim of the official bondsmen of said deceased for \$40,627.27. The within claim presented to A. H. Statham, administrator of said deceased, is allowed and approved for \$40,627.27, this ninth day of May, 1877. [Signed] A. H. STATHAM, Administrator. Allowed and approved for \$40,627.27, this ninth day of May, 1877. [Signed] GILLUM BAILEY, Probate Judge. Filed, ninth May, 1878. [Signed] A. M. CLARK, Probate Clerk."

The claim was therefore presented, allowed, and approved as a claim due and payable by the estate to the claimants.

But the evidence proves, beyond a reasonable doubt, that the claim was not for a demand against the estate then due and payable to the claimants, and that its allowance by the administrator, as a claim of that character, was the result of a collusive understanding and arrangement between the administrator and his co-sureties upon the bond of the intestate, to relieve himself and them from their obligations on the bond at the sacrifice of the estate; for the uncontradicted evidence shows that when the claim was presented to the administrator the surties had not paid the judgment. On the very day that the claim was made out, they met to consider ways and means for its payment. At that meeting the district attorney of Fresno county proposed, if they would pay the costs in the case, the county would extend time for payment of the judgment. That proposal was accepted, and for the purpose of acting accordingly, and also providing for the payment of the judgment, they appointed three of their number, namely, Sutherland, Esery and Morrow, to act as "trustees and attorneys in fact for them;" and, by a power of attorney which was duly executed, acknowledged, and recorded, they empowered them, "for us, and in our names, etc., and for our use and benefit, to ask, demand, sue for, recover, etc., all such sums of money, debts, etc., as are now or shall hereafter become due * * * to us from the estate of W.

W. Hill, deceased, or his heirs or legal representatives, and have, use, and take all lawful ways and means, in our names or otherwise, for the recovery thereof, by attachment, etc., or otherwise, * * * and other sufficient discharges in our names to make, seal, and deliver; to bargain, contract, agree for, purchase, receive, and take lands, tenements, etc., and accept seizin and possession of all lands, * * * and to lease, * * * bargain, sell, * * * convey, mortgage, etc., lands, etc. Also to bargain and agree for, buy, sell, mortgage, etc., and in every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession, that may be received by them from the said estate of W. W. Hill, deceased, or his heirs or legal representatives, and to make, do, and transact all and every kind of business, of what nature or kind soever, as they may deem beneficial to our interest in connection with our claim against the said estate of W. W. Hill, deceased, his heirs and legal representatives."

Statham, the administrator of the estate, attended the meeting, signed and acknowledged the power of attorney, and participated in the plan arranged for the payment of the costs to the district attorney, and the ultimate payment of the judgment. The result was, the "trustees and attorneys in fact of the sureties," on the same day, borrowed \$1,248, which they paid to the district attorney, and Statham appropriated for the same purpose \$2,000 in his hands as administrator, which being paid over in satisfaction of the costs in the action, the claim against the estate was made out by the "trustees," and presented to the administrator, who immediately allowed and approved it. The entire basis of the claim as an absolute demand against the estate was this payment. The appropriation by the administrator of \$2,000 of the estate for his individual purposes was an unauthorized and illegal act. An unauthorized appropriation of funds of an estate cannot be made the basis in whole or in part of a claim against the estate. The payment made by the sureties on the judgment, therefore, only amounted to \$1,248, and the administrator knew the fact. Being examined as a witness in his own behalf, he testified: "When the claim was presented to me, I knew of no payment having been made to the county by any of the claimants except the sum of \$3,248, and \$2,000 of that I paid out of the estate; the rest was paid by the trustees of the claimants." Yet, with that knowledge, and the knowledge of his own interest in the claim, he allowed the claim presented to him for \$40,627.27, as justly due and owing by the estate to the claimants.

There is no doubt that sureties who are compelled to pay a debt of their principal have a legal demand for reimbursement which they may enforce against him by personal action, if he be alive, or against his estate, if he be dead. But in either case reimbursement can only be claimed for what has been expended. Sections 2847, 2848, Civil Code. Here the demand did not accrue until after the death of the

principal, and for any moneys paid by them the sureties had an absolute demand against the estate which they were legally entitled to enforce according to law. But \$1,248 was all that was legally paid by them, and for that sum no claim against the estate was ever presented. The unpaid judgment against them was not an absolute, provable claim against the estate; it was merely a possible or contingent claim arising out of their adjudicated connection with the bond of the intestate, which might never become absolute; for the sureties may not have been able to pay the judgment against them, and the judgment might never have been enforced. At all events, until payment they had no enforceable demand against the estate for the amount of the judgment. Sections 709, 1059, Code Civil Proc.

In *Pico v. De la Guerra*, 18 Cal. 422, a claim against an estate was predicated upon a guaranty to indemnify a surety upon a promissory note. Before the note became due and payable the guarantor died, and the surety, before he had paid the note, presented a claim upon the guaranty, which the executor allowed and approved; but the allowance and approval were held unauthorized and void, because, as the claim against the estate was merely contingent upon payment by the surety of the promissory note of his principal, no cause of action accrued until the contingency happened, and no recovery could be had against the estate either by the presentation of an immature claim, or by suit at law against the estate. So it was in the proceedings in hand. The alleged claimants were liable as debtors of Fresno county for the judgment recovered against them as sureties upon the official bond of the intestate; but they were not creditors of the estate holding an enforceable demand against it for the amount of that judgment, because they had not paid the judgment; and until payment thereof they were not entitled to proceed against the estate to enforce its payment in the course of administration. Besides, as the administrator himself was personally interested in the claim, he was disqualified by law from acting upon it. Section 1510, Code Civil Proc. The minor heirs are not estopped from questioning the correctness of the administrator's account by reason of the proceedings in the probate court for a sale of the real property to pay the alleged claim. It results that the payments made by the administrator upon this claim, and allowed him by the probate court on the settlement of his account, were erroneously allowed.

Judgment and order reversed, and cause remanded for further proceedings.

We concur: ROSS, J.; MCKINSTRY, J.

(2 Cal. Unrep. 501)

REAY v. BUTLER and others, and TREADWELL, Intervenor. (No. 8,937.)

Filed July 30, 1885.

1. INTERVENTION IN EJECTMENT—EFFECT OF.

The effect of an intervention is to add new parties for the purpose of determining all conflicting claims to the matter in controversy, and does not affect the nature of the action at all, or interfere with the trial thereof; and therefore, where the plaintiff, in an action of ejectment, desires a jury trial, the filing of an intervention praying equitable relief will not affect such right, and a denial of a jury is error.

2. EJECTMENT—INTERVENTION, WHEN ALLOWED.

A person who does not claim to have derived title from both plaintiff and defendant in ejectment, and does assert title in himself paramount to both, cannot intervene in such action. Whether intervention applicable to ejectment at all, *quære*.

3. COMPLAINT—PRAYER—AMOUNT OF JUDGMENT.

Where an intervenor in an action prays for only part of the demanded premises, it is error for the court to render judgment in his favor for the whole of the same, and to enjoin the plaintiff from prosecuting or maintaining an action therefor.

Department 1. Appeal from superior court, city and county of San Francisco.

E. A. Lawrence and Flourney & Mhoon, for appellant.

Fisher Ames and Wash. C. Burnett, for respondent.

McKEE, J. From a final judgment entered on the thirty-first of December, 1879, and from an order made and entered on the twenty-eighth of December, 1880, denying a motion to vacate and set aside said judgment, the appeal in this case has been taken. The judgment was rendered in a proceeding of intervention filed in an action of ejectment, brought by J. W. Reay against John Butler and P. H. Owens, defendants, to recover possession of a tract of land "situate in the city and county of San Francisco, described as follows, viz.: Commencing at a point 8.04 chains south of the quarter section post in the center of section 7, township 2 S., range 5 W.; thence north 22.54 chains; thence east 26.80 chains; thence running north 80½ degs., east 3.08 chains; thence south 24.85 chains; thence west 29.44 chains, to the place of beginning, containing 54.30 acres, more or less, being the land immediately west of what is known as the "Dana Tract," and what was formerly the San Souci rancho, and located near the Lone Mountain cemetery, and adjoining Kilian's and Culver's land."

The complaint was filed on the twentieth of February, 1866. On the second of March, 1866, the defendants appeared, by J. P. Treadwell, their attorney, and filed an answer in which they "deny each and every the allegation in the said complaint contained," and aver that J. P. Treadwell was, "at and before the filing of the complaint, and still is, the owner of, and in the possession and occupation, and entitled to the possession, of the land; and that they are in possession under and by license from him, and in subordination to his right and

title, and not otherwise;" and that "said Treadwell is ready and willing to and does defend this action as landlord and owner of the demanded premises."

Pending the action upon the issues raised by that answer, Treadwell, the attorney of record for the defendants, upon the twenty-fifth of June, 1867, applied, in proper person, for and obtained an order permitting him, in his own behalf, to intervene in the action, and on the same day he filed his complaint in intervention, in which he alleged that he was the owner and in possession of a tract of land described as "all that part of the demanded premises known as and called 'Speck Ranch,' (and otherwise as 'Treadwell's Ranch.')

Said ranch is situated in the city and county of San Francisco, is within the demanded premises, and is bounded and described as follows: "Commencing at the north-west corner of the San Souci property, as called for, near a shed there; thence west 7.29 chains; thence south 88 degs. 10 min., west 11.38 chains; then south 86 degs. 30 min., west 10.87 chains, on the east, south, and west, by a line running south from said north-west corner 17.38 chains; thence north 15 degs., west 1.65 chains; thence to west end of the line above described as the northerly boundary line of said ranch;" that plaintiff and defendants have confederated "to trick him out of possession of said ranch, by means of a clandestine suit of ejectment," founded on a pretended deed or conveyance of said ranch, made by the defendant Owens to the plaintiff, upon which the plaintiff intends to rely in the trial of the action; that said deed is a cloud upon his title; and that the claim based upon it "is without right, invalid, and unfounded;" therefore he asked that he be quieted in his title and possession against said claim, and that Reay, the plaintiff in the ejectment, be forever enjoined from prosecuting the action, and from commencing and prosecuting any other action against him for the recovery of said ranch.

No answer was filed to the intervention by Butler and Owens. Each made default, and judgment by default was entered against them. Reay filed an answer containing specific denials of all the allegations contained in the complaint, and on the eighth of February, 1868, moved to strike out the intervention, on the ground that the proceeding was not applicable in an action of ejectment. The motion was denied, and he excepted.

The record shows that the case came on for trial on the twenty-fifth of February, 1868, before a jury impaneled and sworn to try the cause; that in the course of the trial, upon motion of the intervenor, the court, over the exception of the plaintiff, discharged the jury, and ordered that the case be put upon the equity calendar for trial by the court sitting without a jury; that afterwards, in November, 1869, the intervention was tried and submitted; that no decision was rendered until the fourteenth of April, 1873, when findings for the intervenor were ordered to be "drawn and submitted for settlement;" that the findings were not settled until the thirty-first of December, 1879,

when they were filed, and upon them a decree was entered on the same day, adjudging that, "at the time the action of ejectment was commenced, the intervenor was and still is the owner of the land described in the complaint, and complaint in intervention, and neither the plaintiff nor either of the defendants, Butler or Owens, had or have any right or title thereto, and the facts as to the possession and title entitles the intervenor to a decree quieting him in his title and possession to the said land in question against the plaintiff;" and "that the plaintiff, J. W. Reay, be, and is hereby, perpetually enjoined from further prosecuting his complaint in ejectment in this case, and from all further proceedings therein in this cause, and from bringing and prosecuting any other action of ejectment *for the Speck ranch*, the land in the complaint, and the complaint of intervention described against the intervenor's servants or tenants by collusion with them not to inform the intervenor thereof."

The contention which is made on the appeal is that the court below erred in (1) denying the motion to strike out the intervention; (2) discharging the jury impaneled and sworn to try the case, and refusing to try the original action; (3) ordering the case to be submitted upon the issues joined in the intervention only; and (4) denying the motion to set aside the decision and judgment announced therein. This contention involves the regularity of the proceedings in intervention, and the right of intervention in an action of ejectment.

Assuming that the right existed, we think that the plaintiff in ejectment was entitled to a trial of the issues joined between himself and the defendants, and that he had a right to a trial by jury. Section 153, Pr. Act; *Weber v. Marshall*, 19 Cal. 447.

The statute under which the intervention was inaugurated required that the complaint be filed before or after the joinder of issue in the original action, and at such a time as would not interfere with or delay the trial thereof. Section 660, Pr. Act; *Hocker v. Kelley*, 14 Cal. 164. And after joinder of issue in the intervention in the action, it was made the duty of the court to try and decide both issues at the same time. Section 662 of the Practice Act (St. 1874. p. 73) declared that "the court shall determine upon the intervention at the same time that the action is decided." Intervention under the statute, therefore, merely results in the addition of a new party or new parties to an original action for the purpose of hearing and determining, at the same time, all conflicting claims which may be made to the subject-matter in litigation. It was not intended to change the nature and character of the action itself, or to stop the machinery of a trial thereof. The denial of the right of the plaintiff to a jury trial was therefore erroneous, and the discharge of the jury which had been impaneled and sworn to try the action was irregular. Besides, the intervenor did not claim a right to the demanded premises in conflict with the right of entry asserted by the plaintiff in the ac-

tion of ejectment against the defendants. In his complaint he alleges that he is "owner and in possession of all that *part* of the demanded premises known as and called 'Speck Ranch,' (and otherwise as 'Treadwell's Ranch,')" which "is within the demanded premises." He thus asserted a right to only *part* of the demanded premises, but the court adjudged him to be the absolute owner of *all* the demanded premises, and perpetually enjoined the plaintiff from prosecuting his action, and from ever thereafter maintaining any other action for the same land. This was error. *Hayes v. Martin*, 45 Cal. 559. Moreover, the intervenor admitted, because he alleged that he was in the actual possession of all the land which he claimed, under paramount title to it. He was therefore vested with complete proprietorship; and neither between him and the plaintiff in the action, nor between him and the defendants, was there any conflicting claim as to the possession. The plaintiff claimed no right of entry against him, and he claimed no right of entry against the plaintiff nor against the defendants. Ejectment was brought against the defendants only; and they, having appeared by an attorney, with whom there could have been no collusion, because he was the intervenor himself, denied the right of the plaintiff to possession, and admitted possession in themselves as licensees of their landlord, the intervenor. The right of possession was, therefore, the only matter at issue between them and the plaintiff. No ejectment is maintainable where a plaintiff has not a legal right of entry against defendants named in the action. The intervenor was not named as a party. He was not, therefore, connected in any way with the matter at issue between the parties. He did not claim to have derived title to the demanded premises from either the plaintiff or defendants, or either of them; and he *did* claim to be in actual possession and vested with title paramount to both. In ejectment, a person who is no way connected with the right of possession asserted by the plaintiff or the defendant, but, on the contrary, alleges title in himself paramount to both, has no right of intervention. *Porter v. Garrissino*, 51 Cal. 559.

Upon the allegations of his complaint the intervenor had no cause of intervention. The alleged facts may have constituted a direct cause of action in equity under section 254, Prac. Act, independent of the ejectment suit. Intervention was therefore unnecessary, because, as the intervenor had appeared as attorney for the defendants, he could have defended the action for them; or, if it were possible, under the circumstances of his appearance as their attorney, to have presumed collusion between the plaintiff and his clients as his tenants, he, as landlord, could have had himself substituted as a co-defendant with them, or as a defendant in their stead. *Dutton v. Warshauer*, 21 Cal. 619; *Valentine v. Mahoney*, 37 Cal. 389. Otherwise, having no personal connection with the question at issue in the case, there was no way in which he could be prejudiced or his rights affected by any judgment therein, unless in assuming the defense he

himself put the title in issue. *Russell v. Mallon*, 38 Cal. 259; *Valentine v. Mahoney*, *supra*. And that being the case, the right of intervention was inapplicable. *Horn v. Volcano Water Co.* 13 Cal. 62.

Whether intervention is applicable at all to an action of ejectment it is not necessary in this case to determine. As we have already announced, where a person does not claim to have derived title from the plaintiff or defendant in the action, and does assert title in himself paramount to both plaintiff and defendant, there can be no intervention. *Porter v. Garrissino*, *supra*.

Judgment and order reversed, and cause remanded for further proceedings.

ROSS and MCKINSTRY, JJ., *concurring*. We concur in the judgment, and in what is said by Mr. Justice McKEE down to the words "moreover, the intervenor admitted," etc. We also agree that the facts stated in the complaint of Treadwell are insufficient to show a cause of intervention on his part in the action of ejectment.

(67 Cal. 246)

WEIHE and others v. STATHAM and others. (No. 8,255.)

Filed July 30, 1885.

1. ADMINISTRATOR—LIABILITY FOR FRAUDULENT SALE OF LAND.

An executor or administrator, who fraudulently sells the defendant's realty, is liable in damages in double the value of the land sold, such damages being recoverable in an action by the person having an estate of inheritance therein, but they are not recoverable from the sureties on the bond of such executor or administrator. Code Civil Proc. Cal. § 1572.

2. ADMINISTRATOR'S OR EXECUTOR'S BOND—ACTION ON.

No action is maintainable on the bond of an executor or administrator, to recover for his neglect or misconduct in the sale of decedent's realty, unless the estate has suffered damage thereby; and where it appears the land was sold for its full value, it is presumed that no damage was suffered; and regarding any mismanagement of the proceeds, the party will be left to his remedy in the probate court.

Department 1. Appeal from superior court, county of Fresno.

H. S. Dixon, for appellant.

Sayle & Harris, for respondent.

ROSS, J. The complaint, a demurrer to which was sustained by the court below, alleges, among other things, the decease of Wm. W. Hill, the appointment of an administratrix of his estate, the statutory publication of notice to creditors, the expiration of the statutory time for the presentation of claims against the estate, the payment of all claims against it, "except for some inconsiderable sums which may have been due for expenses of administration," the then marriage of the administratrix, which operated a revocation of her letters, the subsequent appointment of the defendant Statham as administrator, the execution of his bond as such administrator, with the defendants Morrow, Sutherland, and Morgan as sureties thereon, the qualification of the administrator, his subsequent entry upon the duties of the trust, and his receipt of real and personal property of the estate of large value,
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and then charges, in substance, that defendant Statham did "fraudulently sell all the real property of the decedent," in that he did, on the ninth of May, 1877, enter into a fraudulent scheme and conspiracy with certain-named persons, including two of the sureties on his bond as administrator, whereby those persons, through three of their number, should make, swear to, and present to Statham, for allowance as administrator, a pretended claim against the estate in the sum of \$40,627.27, in which Statham was interested to the extent of \$5,000, and whereby Statham, as administrator, should allow the claim in the full amount for the joint benefit of the parties interested, and that by representing to the probate judge by affidavits that the amount of the claim was justly due to the claimants, procured the approval thereof by the probate judge; that pursuant to such fraudulent scheme the claim was presented to and allowed by the administrator, Statham, he then "well knowing that the same and the whole thereof was then, and long prior thereto had been, barred by the statutes of limitation in such case made and provided," and also by the judge of probate; that in further pursuance of the alleged fraudulent scheme, "and finding that proceedings previously taken by him in said probate court for sales by him previously made to C. G. Sayle and William Glenn of all of the real property of said estate for the purposes aforesaid were not legal, and passed no title to said parcel No. 1, (of land,) especially to said agents and attorneys, who then attempted to hold such title for and on his behalf, and for said other pretended claimants," the defendant Statham, as administrator, subsequently presented to the probate court, having jurisdiction of the estate, a petition praying for an order of sale of the real property of the estate for the purpose of paying the debts of the estate, and the costs and expenses of administration, and that such proceedings were had thereon as that on the twenty-fifth of February, 1878, the probate court made an order authorizing defendant Statham to sell the real property of the estate for the purposes stated in the petition for sale; that the proceedings in relation to such sales were in accordance with the provisions of the statute regulating such matters, in so far as mere procedure was concerned, but that, as a matter of fact, there were, at the time of the presentation of the petition, and at the time of the making of the order of sale, no valid debts or claims against the estate, except for expenses of administration, and that the amount of those were exaggerated in the petition; that at the time of making the order for the sale of the real property of the estate, the probate judge required the defendant Statham, as administrator, to execute an additional bond for the faithful discharge of the duties of his trust, which he did, with the defendants Morrow, Faymonville, Esery, and Goforth as his sureties thereon; that under the order of sale, and in further pursuance of the fraudulent scheme, defendant Statham, as administrator, "did, prior to the twenty-second day of March, 1878, receive a bid from said Glenn, which bid, save so far as said parcel No. 2 is

concerned, was, as said defendant Statham then well knew, so made in the interest alone of himself and said other pretended claimants, and in order to protect their title thereto then held for them, including himself, said Statham, by their said agents and attorneys, for the whole of said real property, for and in the sum of \$5,068 for said parcel No. 1, and \$1,880 for said parcel No. 2, and did, on said twenty-second day of March, 1878, make and file his return of such sales to said probate court, upon which he caused to be had such legal and proper proceedings that thereafter, on the fourth day of April, 1878, he did, for the purposes and in behalf of the persons aforesaid, including himself, procure from said probate court an order, that day duly made and entered, confirming said sales, and directing him as such administrator to convey said lands to said Glenn, whereupon, on the same day, he did, as such administrator, execute, acknowledge, and deliver to said Glenn a conveyance of all said lands, who, upon the same day, did execute, acknowledge, and deliver to said agents and attorneys, for said pretended claimants, all the lands described in said parcel No. 1, and also gave his note for \$1,880, the purchase money for said parcel No. 2, and his mortgage on the lands described in said parcel No. 2, to said Statham, as such administrator, who thereupon applied the same to said pretended claim; "that the real property so sold was, at the time of sale, ever since has been, and now is, of the value of \$6,984, the amount for which it was sold, as we understand the averment of the complaint.

The complaint contains the further averment "that all said real property has passed into the hands of innocent purchasers for value without notice of said frauds;" that the averments hereinbefore referred to with respect to the fraudulent practices, as to the party verifying the complaint, are made on information and belief; that the facts constituting the alleged frauds did not come to the knowledge of the plaintiffs until March 14, 1881, and "that by said unlawful and fraudulent sales of said real property plaintiffs are and have been damaged in a large sum of money, to-wit, \$13,896,"—being double the amount of the alleged value thereof,—the action being based, as said by plaintiffs' counsel, upon section 1572 of the Code of Civil Procedure, which reads:

"Any executor or administrator who fraudulently sells any real estate of a decedent contrary to, or otherwise than under, the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein."

Counsel is mistaken in supposing that this section authorizes the recovery upon the *bond* of the administrator. The preceding one, section 1571, provides for an action upon the bond in case of neglect or misconduct in the proceedings of the executor in relation to any sale. It reads:

"If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers

any damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise."

And this is followed by the provisions of section 1572 which make the *executor* or *administrator*, as the case may be, who fraudulently sells any real estate of a decedent,—but not the sureties,—liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein. It is evident, therefore, that section 1572 of the Code of Civil Procedure affords no warrant for an action upon the bond of the administrator for the recovery of double the value of the land alleged to have been fraudulently sold by the administrator. Nor does the complaint in question contain sufficient averments to entitle the plaintiffs to recover under the provision of section 1571, *supra*. The right there given (upon the bond) is to any person interested in the estate who "*suffers damage*." The complaint contains no averment with respect to any proceedings in the probate court having jurisdiction of the estate of the deceased, Hill, subsequent to the confirmation of the sale of the land, but does show, affirmatively, that the land was sold for its full value, to-wit, \$6,948. Presumptively, of course, the probate court has required or will require the administrator to make proper disposition of the money. If it properly belongs to the plaintiffs in the present suit it will doubtless go to them under the decree of the probate court. If, under the decree of distribution, they should be awarded the money realized on the sale of the land, shown by the complaint in the present action to have been its true value, they would not be pecuniarily damaged by the alleged misconduct of the administrator, and cannot recover the same amount in another and independent action. In so far as the complaint here shows, the remedy of the plaintiffs is in the probate court.

Judgment affirmed.

We concur: McKINSTRY, J.; McKEE, J.

(67 Cal. 255)

WALTON v. KARNES. (No. 9,136.)

Filed July 30, 1885.

TRUST—CONTRACT FOR PURCHASE OF LAND—ADVANCE OF PURCHASE MONEY—
RESULTING TRUST—STATUTE OF FRAUDS.

An oral agreement to advance for another certain money, to be used in payment of the purchase price of land for the latter, the former taking the conveyance in his own name as security for his advances, will create a resulting trust in his favor, to the extent of his advances, and will not be void under the statute of frauds.

Department 1. Appeal from superior court, Fresno county.

Campbell & Hinds, for appellant.

Bennett & Wigginton and E. D. Edwards, for respondent.

McKEE, J. This case, as presented by the record, is this: By a verbal arrangement between plaintiff and defendant in the action,

entered into pending a contest between the plaintiff and other persons, before the land agent of the Southern Pacific Railroad Company, for the right to purchase from the company the south-west quarter of section 3, township 14 S., range 22 E., M. D. base and meridian, the defendant agreed, "if the contract of sale should be awarded plaintiff, to advance for him the money necessary to make the first payment upon the land, and the plaintiff agreed to repay the defendant the moneys advanced by him for that purpose, with interest at 1½ per cent. per month from the date of the advances until paid, and to secure their payment by causing the contract of sale to be issued in the name of the defendant, to be held by him until repayment, when the contract was to be assigned to the plaintiff."

The right to purchase was awarded to the plaintiff, and on the fifteenth of December, 1881, defendant advanced for him the sum of \$492, as the first payment of the purchase money of the land. At plaintiff's request the contract of sale was made in the name of the defendant, and delivered to him. Twelve months after the transaction of purchase, another payment for interest in advance becoming due on the contract, defendant, at plaintiff's request, advanced it for the plaintiff upon the same terms as to interest and security. These advances, and the interest thereon, aggregated the sum of \$895. This sum the plaintiff, on the twenty-second of January, 1883, tendered to the defendant, with the request for the assignment of the contract. The defendant refused to accept the money, or to assign the contract, and he contends that he had the right to do so, because, as the verbal agreement between him and the plaintiff related to real property, it was void. But it is not void; because, as the contract of sale was taken by the defendant as security for repayment of the advances made by him for the plaintiff in purchasing the land, a resulting trust in the land was created to the extent of the advances. Section 853 of the Civil Code declares:

"When a transfer of real property is made by one person, and the consideration thereof is paid by *or for another*, a trust is presumed to result in favor of the person by *or for whom* such payment was made."

Where a resulting trust exists, the statute of frauds has no application. *Millard v. Hathaway*, 27 Cal. 139.

Judgment and ordered affirmed

I concur: ROES, J.

McKINSTRY, J. I concur. As I understand the transaction, the plaintiff paid the whole of the purchase money which was, in fact, paid. The money was loaned by the defendant to the plaintiff, and the former paid it to the railroad company as *agent* of the latter. The case is not affected by the circumstance that other payments may remain to be made on the contract. Certainly the defendant is in no better position than if he had actually made all the other payments

himself. Although a verbal agreement by A. to purchase land for B. may not be given in evidence to establish a resulting trust where the entire purchase money has been paid by A., and the conveyance taken in his name, yet, if any part of the purchase money is shown to have been paid by B., a verbal agreement may then be proved which shall have the effect to deprive A. of all beneficial interest in the purchase, and to clothe the entire estate in his hands with a trust in favor of B. *Hidden v. Jordan*, 21 Cal. 92.

(67 Cal. 261)

Ex parte TITTEL, on Habeas Corpus. (No. 20,086.)

Filed July 31, 1885.

HABEAS CORPUS—JUDGMENT—CONTEMPT.

On a proceeding for contempt against a judgment debtor for failure to comply with the provisions of the judgment, it is sufficient answer, on the hearing of the contempt proceeding to such charge, by a person not a party to the suit, that the judgment has been satisfied by the plaintiff on the record.

Department 2. Application for *habeas corpus*.

Robert Ash, for petitioner.

By THE COURT. When this proceeding was commenced, satisfaction of the judgment had been filed by an assignee of the judgment, one Henry Huber, and entered of record. Before that time the assignee had filed his assignment from plaintiff with the clerk of the court, entitled in the case of *Lichtnock v. Tittel*, and with the papers in that case. This assignment authorized the assignee Huber to prosecute the suit above entitled, to collect the judgment and receipt therefor, and to enter satisfaction thereof in the name of the assignor or otherwise, as he shall deem proper. Subsequently, on the day the order on defendant to show cause why he should not be adjudged guilty of contempt in not obeying the judgment of the court was made, a satisfaction piece of the same judgment was signed, acknowledged, and filed by Huber and Lichtnock. So when the proceeding was commenced, and when the motion to punish for contempt was heard, the record showed that the judgment was satisfied and no longer existed.

This proceeding is prosecuted by one C. W. Cramer, who claims to be an assignee prior to Huber. Here, when the motion to commit was heard, was a satisfaction of the judgment by the plaintiff in the action, on file and of record. This is a sufficient answer to the charge of contempt by a person not a party to the suit, claiming under an alleged prior assignment, the priority of which is disputed.

The petitioner is entitled to his discharge; and it is so ordered.

(67 Cal. 262)

SMITH and others v. CUNNINGHAM. (No. 9,670.)

Filed August 1, 1885.

ADVERSE POSSESSION—RIGHT TO GROWING CROP—REPLEVIN.

Replevin will not lie against person in adverse possession of land for growing or harvested crop, raised during such possession, at the suit of another claiming the title to the land, as replevin cannot be made the vehicle for testing the title to land.

Department 1. Appeal from superior court, San Joaquin county.

W. L. Dudley, for appellant.

Geo. E. McStay, for respondent.

SEARLS, Commissioner. This action was brought to recover a quantity of hay, or its value. Plaintiffs had judgment. Defendant moved for a new trial, which was refused, and the cause comes up on appeal from the judgment and order denying the motion for a new trial. In October, 1882, plaintiff Mary V. Smith entered upon the N. W. $\frac{1}{4}$ of section 17, township 3 N., range 9 E., M. D. M., in good faith as a pre-emption claimant, claiming the right to pre-empt the same under the laws of the United States, and has ever since occupied and cultivated, and has been continuously in the actual and exclusive possession of, said land, in good faith as such pre-emption claimant, holding the same adversely to all other persons. While thus in the actual, exclusive, and adverse possession of the land, she and her tenant, W. F. Smith, plowed the land and sowed it in wheat, which they cut and made into the hay which the defendant, as the sheriff of San Joaquin county, levied upon, under a writ of attachment duly issued, etc., against the property of J. Wright Johnson. At the date of the entry of Mary V. Smith upon the land in question, said J. Wright Johnson was and still is the holder of the legal title to said land. J. Wright Johnson, though the legal owner of the land in question, could not have maintained an action to recover the hay. Plaintiffs were in the possession of such land, holding the same adversely to said Johnson; had cultivated, planted, raised, and harvested the crop while so holding adversely. In such case it is settled an action of replevin will not lie. Such action cannot be made the vehicle for testing the title. *Pennybecker v. McDougal*, 46 Cal. 661; *Martin v. Thompson*, 62 Cal. 618. Having no such title to the hay as would support an action for its recovery, it was not subject to seizure by the sheriff as Johnson's property at the suit of his creditor. This view of the case was taken by the court below, and rendered it unimportant to determine as to the validity of the writ of attachment under which the defendant, as sheriff, levied upon the property. If regular, it could not justify him in taking plaintiff's property; and if irregular, he was in no worse position.

The errors assigned upon the action of the court in the admission of testimony, so far as supported by the record, are without merit. We find no error in the record, and the judgment should be affirmed.

We concur: BELOHER, C. C., and FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(87 Cal. 258)

PICO v. COHN and others. (No. 9,665.)

Filed July 30, 1885.

1. NEW TRIAL—ERRORS OF LAW NOT SPECIFIED, WAIVER OF.

Where, on motion for a new trial, the notice states that the motion will be made on the ground of errors of law occurring at the trial, and no errors are specified, the court will presume that they were disregarded. Cal. Code Civil Proc. § 659, sub. 3.

2. INSUFFICIENCY OF EVIDENCE AS GROUND FOR NEW TRIAL—DISCRETION OF COURT.

Where a motion for a new trial is made on the ground of insufficiency of the evidence to justify the verdict or decision, it is addressed to the sound legal discretion of the court; and if a new trial is granted thereon, the supreme court, on appeal, will not reverse the order unless it appear that there has been a manifest abuse of such discretion.

In bank. Appeal from superior court, county of Los Angeles.

Glassell, Smith & Patton and *Graves & Chapman*, for appellants.

Brunson & Wells and *R. H. Chapman*, for respondent.

THORNTON, J. This is an appeal from an order granting the motion of defendants for a new trial. The notice of the motion for a new trial stated that it would be made on errors of law, and the insufficiency of the evidence to justify the decision. As the errors of law were not specified as directed by the Code, we must presume that they were, in accordance with the statute, (Code, Civ. Proc. § 659, sub. 3,) disregarded. The ground of insufficiency of evidence alone remains. On the hearing of the above motion, the court, on the twenty-fourth of May, 1884, made an order granting it, unless the plaintiff within five days file his written consent to a modification of the decree herein, so that it shall require the payment by plaintiff to defendants, within 30 days from the date of the order, of the sum of \$138,000, with legal interest from such date, instead of the sum of \$103,000, as stated in the decree, and on the filing by the plaintiff within the time mentioned of his assent to such modification, the new trial be denied and the judgment modified accordingly. The plaintiff refused his consent to this modification, and a new trial was ordered.

The order could only have been granted on the grounds on which it was asked by defendants. The defendants had nothing to say, and were not called on to say anything, in regard to the modification set forth in the above order. The plaintiff having refused to give his consent, the motion of defendants then stood as if no such order had been made. We are thus driven to pass on the order for a new trial as having been made on the insufficiency of the evidence to justify the court's decision. If we were to reverse the order, the judgment for \$103,000 would stand unchanged, although the court had substantially admitted an error in the decree in requiring the

plaintiff to consent to a change in it, requiring him to pay a much larger sum as a condition to its refusing defendants' motion. This would seem to be, under the circumstances, clearly unjust.

The learned counsel for plaintiff is obviously mistaken in assuming that the defendants, in their specifications of the insufficiency of the evidence, have failed to make objection to so much of the findings as would justify the judgment rendered by the court below, or that their specifications only extended to the amount which the plaintiff should be adjudged to pay. It will be observed that the case of plaintiff rests upon the allegation that defendant Cohn agreed to advance, and did advance, certain sums of money to plaintiff, to secure the payment of which the deed executed by him to defendant, sought herein to be declared and adjudged a security, was given. This was denied by defendants, who set up that there was no advance made, or agreed to be made, by Cohn, but that the money paid to the plaintiff by defendants was a payment for the property in controversy, absolutely purchased of plaintiff by defendants, and that the deed was made on such purchase, and not at all as security for the payment of any sum whatever. Now, one of the specifications of insufficiency goes to this issue. The defendants set forth in their specifications that the evidence is insufficient to sustain so much of finding 4 as finds that it was understood and agreed that said Cohn should advance the amount of said liens as estimated by him, but, on the contrary, the evidence shows that Cohn absolutely refused to advance any money for and on account of said Pico. This matter of advance goes to the very foundation of plaintiff's case, for if there was no agreement for an advance, and no advance, the case of the plaintiff is at an end.

There are other matters specified of the same character; but, for the purposes of the argument, no others need be stated. In *Peters v. Foss*, 16 Cal. 357, it was held that a motion for a new trial is addressed to the sound discretion of the court, and this court can interfere only in case of a plain abuse of discretion by the court below. This court affirmed the same rule in *Quinn v. Kenyon*, 22 Cal. 82, and in the opinion it is said: "It is only in rare instances, and upon very strong grounds, that this court will set aside an order granting a new trial." And it has been uniformly held by this court that a motion for a new trial, on the ground of insufficiency of the evidence to justify the verdict or decision, is addressed to the sound legal discretion of the court below, and that, on appeal from an order granting a new trial, this court will not reverse the order unless it appears that there has been a manifest abuse of discretion. *Hall v. The Emily Banning*, 33 Cal. 522; *Phelps v. Union C. M. Co.* 39 Cal. 410; *Pierce v. Shaden*, 55 Cal. 406; *Bronner v. Wetzlar*, Id. 419; *Gerald v. J. M. Brunswick & Balke Co.*, ante, 306. As we find no abuse of discretion in making the order herein appealed from, we should act in utter disregard of a well-settled rule of this court were we to disturb the order in this case.

Our judgment is that the order should be affirmed; and it is ordered accordingly.

We concur; ROSS, J.; MYRICK, J.; MCKINSTY, J.; MORRISON, C. J.

(67 Cal. 235)

BROWN v. WILLIS. (No. 9,896.)

Filed July 30, 1885.

FORECLOSURE OF MORTGAGE—ENFORCEMENT OF DEBT.

Whatever the form of debt, a mortgagor cannot be legally compelled to pay any part of it until a decree is entered for sale of the mortgaged premises, and the only liability which then accrues to him is a liability to pay only a deficiency which shall appear on the return of the sheriff on such sale.

Department 1. Appeal from superior court, county of San Bernardino.

Byron Waters, for appellant.

C. W. C. Rowell, for respondent.

ROSS, J. The findings show that on the second day of September, 1878, an action was commenced in the late district court of the Eighteenth judicial district by one Aldrich against the plaintiff and defendant to the present action—H. M. Willis and Joseph Brown—and Amelia Willis, Jr., to foreclose a mortgage that had been given by H. M. Willis as security for a note executed by him to one Drew, Drew having assigned the note and mortgage to Aldrich. Brown was made a party to that action because he held, as assignee, a subsequent mortgage upon the same premises that had been given by Willis to secure a note executed by him, November 22, 1875, to one Thomas, and made payable one year after its date. The note held by Brown was therefore due at the time of the commencement of the action by Aldrich to foreclose the first mortgage executed by Willis, and as both Willis and Brown were parties to that action, the court, by its decree, could have settled the respective rights of all of the parties. The purpose of making the holder of the second mortgage—it being of record—a party to the suit to foreclose the first mortgage was, of course, to cut off the equity of redemption. The findings here show that in that action Brown set up his note and mortgage, and as the note was due, if his pleadings were appropriate, as they should have been, the court could and should have ascertained, not only the amount due from Willis to Aldrich on the first note and mortgage, but also the amount due from him to Brown on the second note and mortgage, and by its decree have directed a sale of the mortgaged property, or so much thereof as should be necessary, and the application of the proceeds of the sale to the payments of the costs and expenses of sale, and the amount due—*First*, to the plaintiff, Aldrich, on the first note and mortgage, and, *secondly*, of the amount due to the defendant Brown on the second note and mortgage; and further directing, in the event the sheriff's return should show the proceeds

to be insufficient, and a balance to remain due on either or both of the amounts found due by the decree, that judgment be docketed for said balance against the defendant so found personally liable for the debt, which, under the law, would have become a lien on such real estate as the judgment debtor might have in the county, and on which an execution might have been issued as in other cases. In *Biddel v. Brizzolara*, 64 Cal. 362, it was held that, under the provisions of our statute, (Code Civil Proc. § 726,) whatever the form of the debt, the mortgagor can be legally compelled to pay no part of it until decree is entered for the sale of the premises mortgaged, and the liability which shall then accrue to him is a liability to pay only a deficiency which shall appear on the sheriff's return. "Every person," said Mr. Justice KENT in *Le Guen v. Gouverneur*, 1 Johns. Cas. 502, "is bound to take care of his own rights, and to vindicate them in due season, and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defense in his power, neglects to use them, and suffers a recovery to be had against him in a competent tribunal, he is forever precluded."

It results, we think, that the subsequent action brought by plaintiff, Brown, upon the note executed by defendant, Willis, to Thomas cannot be maintained. Judgment affirmed.

We concur: MCKINSTRY J.; MCKEE, J.

(2 Cal. Unrep. 509)

LEVY v. BALDWIN. (No. 8,980.)

Filed July 31, 1885.

COURTS—DISCRETION AS TO POSTPONEMENT OF TRIAL AND AMENDMENTS.

Court may, in the exercise of its discretion, refuse a second postponement of a trial, or may refuse an amendment to the answer asked for at the trial.

Department 2. Appeal from superior court, city and county of San Francisco.

Lloyd & Wood, for appellant.

Wm. H. Sharp, for respondent.

By THE COURT. The court properly exercised its discretion in refusing a second postponement of the trial, and refusing the amendment to the answer asked for at the trial. The charge of the court was correct, and the request to charge was properly refused. We find no error in admitting the evidence of plaintiff that the stock mentioned in the complaint was purchased for defendant through E. H. Hall & Co.

There is no error in the record, and the judgment is affirmed.

HALEY v. SHEPHERD. (No. 9,901.)

Filed July 31, 1885.

EVIDENCE, CONFLICT OF—JUDGMENT AFFIRMED.

When evidence is conflicting, the judgment of the court below will not be disturbed.

Department 2. Appeal from superior court, county of Los Angeles.

H. Allen and S. Haley, for appellant.

Bicknell & White, for respondent.

By THE COURT. On an examination of the testimony in this case, we cannot say that the conclusion reached by the court below is not correct. It seems to us to be in accord with the deed from the mayor and common council of the city of Los Angeles to Basilio Jurado, under which plaintiff claims. The case presented is one of a conflict of testimony, and in such state of the testimony we never disturb the judgment or order of the court below.

Judgment and order affirmed.

(67 Cal. 267)

JUNKANS v. BERGIN and others. (No. 9,778.)

Filed August 1, 1885.

1. RIPARIAN RIGHTS—APPROPRIATION OF WATER—EVIDENCE.

Evidence as to the quantity of water plaintiff was entitled to appropriate reviewed, and such evidence held to sustain the finding thereon, and also held that defendants had diverted a portion of the water to which plaintiff was entitled, and thereby did him damage.

2. SAME—DIVERSION OF WATER—POINT OF, MAY BE CHANGED.

Riparian owner, having right to divert certain quantity of water from a stream, may take the same at any point on the stream, and may change the point of diversion at pleasure, provided he does not thereby injuriously affect the rights of other appropriators by such change.

Commissioners' decision.

Department 1. Appeal from superior court, county of Trinity.

J. W. Philbrook and Hatch & Chadborne, for appellant.

W. J. Tinnin and J. C. Burch, for respondents.

BELCHER, C. C. This is an action to recover damages for the diversion of water, and for an injunction. The case was tried by the court, and judgment rendered in favor of the defendants. The plaintiff then moved for a new trial, which was denied, and the appeal is from the judgment, and from the order denying the new trial.

It appears that the plaintiff owned two ditches in Trinity county,—one known as the Perkins bar ditch, and the other as the Evans bar ditch,—which took water from Perkins creek and conducted it to Perkins bar, in the Trinity river, where it was used for mining. Perkins creek had a tributary known as Maple creek, and the defendants had two ditches,—one known as the Hop Lee ditch, and the other as the Fronte ditch,—which took water from Perkins creek, and conducted it to a point on Maple creek, where it was used by them in mining.

The Perkins bar ditch had the oldest water-right, and took its water from Perkins creek, about half a mile above the mouth of Maple creek. The Evans bar ditch had the next oldest water-right, and up to 1882 took its water from Perkins creek, just below the mouth of Maple creek. In that year the dam which turned the water into the ditch was so filled up with tailings, which the defendants, by their mining operations on Maple creek, caused to flow down that creek, that it became very difficult and expensive to maintain it so as to keep the water flowing into the ditch, and the plaintiff then moved his dam up Perkins creek to a point about 50 feet above the mouth of Maple creek. The defendants' ditches were constructed after the plaintiff's ditches, and took water from Perkins creek, above the head of the Perkins bar ditch. The defendants and their grantors had been using their ditches to conduct water from Perkins creek to their mines on Maple creek since 1877, till they were stopped from so doing by the temporary injunction issued in this case.

1. The court found the capacity of the Perkins bar ditch to be 247½ inches of water, delivered under a 5-inch pressure, and that, as appurtenant to that ditch, the plaintiff had the first right to take that quantity of water from the creek. The appellant claims that the quantity of water allowed for his Perkins bar ditch is too small, and that the finding limiting it to the quantity named is not supported by the evidence. It is not easy to see just how the court found the exact figures named, but we think there was a substantial conflict of the evidence upon the subject. The complaint alleges the capacity of the ditch to be 300 inches under a 4-inch pressure. The plaintiff testified that its capacity was from 300 to 400 inches, without naming the pressure. One of his witnesses, who was a civil-engineer, testified that he measured it on the twenty-eighth of February, 1884, and that the capacity of the ditch, when "as full as it could carry," was 360 inches under a 4-inch pressure.

For the defense, the respondent Bergin testified that the ditch was enlarged in its capacity one-third in the fall of 1882, and that he first learned its capacity in 1880, and would judge it to be from 150 to 160 inches. Another witness for the defense testified that the ditch was enlarged in 1882 so that it would probably carry 100 or 125 inches more than it would when he first knew it in 1881, and that when he first knew it its capacity was from 150 to 200 inches, though he never measured it exactly. There is no denial on the part of the plaintiff that the ditch was enlarged in 1882, and, looking at all the testimony upon the subject, it would seem that the finding was quite as favorable to the plaintiff as he was entitled to have it.

2. The court found that in 1882 the Evans bar dam was destroyed by tailings sent down by the mining operations of the defendants, and the plaintiff in that year removed his dam, or rather constructed a dam in place thereof on Perkins creek, about 50 feet above the mouth of Maple creek, and diverted water therefrom into his Evans bar ditch,

and as a conclusion of law that the plaintiff, by permitting the defendants to destroy his dam on Perkins creek below the mouth of Maple creek, known as the Evans bar dam, and by erecting in place thereof a new dam on Perkins creek above the mouth of Maple creek, lost his prior rights as against the defendants to the water of Perkins creek, which he had acquired by the construction of the Evans bar dam and ditch. The appellant claims this finding and conclusion to be against law.

The appellant's ditch had capacity to carry 700 inches of water, delivered under a 5-inch pressure. Up to 1882, its head dam being below the mouth of Maple creek, it took the waters of both creeks. To the extent of its capacity, the appellant, being the first appropriator, had the right to have all those waters flow into his ditch; but, subject to that right, the respondents might lawfully divert the water from Perkins creek and use it on Maple creek. *Union Water Co. v. Crary*, 25 Cal. 504. This they had been doing for several years, and it is not alleged that its quantity was diminished, or its quality deteriorated. They had no right, however, by their mining operations, to destroy or to fill up the appellant's dam or ditch, or to materially diminish the quantity or deteriorate the quality of the water, and if they did that, an action might have been maintained against them for damages, and to restrain their works. *Hill v. King*, 8 Cal. 336; *Hill v. Smith*, 27 Cal. 476. Instead of resorting to such an action, the appellant moved his dam to a point above the mouth of Maple creek, where it was impossible to divert the waters flowing down that creek into his ditch, and now seeks to restrain the respondents from diverting water from Perkins creek, and damages for past diversions. Undoubtedly one entitled to divert a quantity of water from a stream may take the same at any point on the stream, and may change the point of diversion at pleasure, if the rights of others be not injuriously affected by the change. *Kidd v. Laird*, 15 Cal. 162. Here the rights of the respondents might be injuriously affected by the change if this action could be maintained. We think the appellant has mistaken his cause of action, and that the findings in this respect are not obnoxious to the objections urged.

The court found that "defendants have at all times respected the prior rights of plaintiff to the 247½ inches of the first flow of the waters of Perkins creek, and have not, nor has either of them, at any time deprived the plaintiff or his said ditch of any portion of said 247½ inches of water to which he had a prior right, nor have they, or either of them, in anywise interfered with or trespassed upon said plaintiff's prior right to said 247½ inches aforesaid, or any part thereof, nor threatened so to do." And it further found that "plaintiff has not been damaged by any acts of the defendants, or either of them, in the sum of \$1,000, nor in any other sum of money, or at all." The appellant claims that these findings are not supported by the evidence, while the respondents insist that there was a substantial con-

flict in the evidence upon the subject. On looking at the evidence, we find that the appellant, speaking of his Perkins bar ditch, testified:

"Since I bought it, water has been running in it steadily, except when turned out to clean the ditch and several times when it has been taken from me, Bergin and Fronte, defendants, took it; they took it two years ago. It was turned back after I notified them not to take it; * * * did not allow me one-quarter of what my ditch was entitled to. My ditch was left only about three inches in the flume. They kept the water during the mining season so long as they mined there; then they gave it up. This water was worth to me from \$2 to \$4 per sluice-head per day. Again, last fall, they took the water from my ditch; it might have been partly in December. When there was plenty of water in the creek, they would use most of it and claim that I was only entitled to forty-three inches. They retained the water that time until I sued out an injunction in this action. * * * A sluice-head is thirty-six inches."

And on cross-examination he testified:

"When defendants were diverting water from the Perkins bar ditch, the amount they took was one-half the quantity that ditch would carry. That ditch was not half-full. I went and measured, and there was only two and one-half inches in our flume."

In answer to this, respondent Bergin testified:

"In taking water in the Hop Lee and Fronte ditches, I have not turned in any water, except where there was water flowing by the dam, which diverts it into Perkins bar ditch."

This is all the testimony cited by respondents to show a conflict, and all, after a careful reading of the transcript, that we have been able to find. Does this show a substantial conflict? It must be noted that the witness does not say that he always allowed water enough to flow by the head of his ditches to fill the plaintiff's ditch, nor does he name any quantity that he allowed to pass. His statement simply is that he never "turned in" any water when there was not water flowing by the plaintiff's dam. This might be literally true, even though, after he had turned it in, there was not water enough left in the stream to half fill the plaintiff's ditch. It should also be noted that in their answer the defendants deny that the plaintiff's ditch has the capacity to carry, or the right to divert, any greater quantity of water than 174 inches, delivered under a 5-inch pressure, and that one of the defendants' witnesses, who had been their ditch-tender, testified that he "always allowed to Perkins bar ditch from 150 to 160 inches." The appellant was entitled at all times to take from the stream 247½ inches of water, delivered under a 5-inch pressure, and it is clear from his testimony that the respondents did not always respect his rights, but diverted a portion of that water from him and thereby did him damage. The testimony of respondents in answer to this was evasive, and did not, we think, create a substantial conflict.

For the reasons last stated, the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

(2 Cal. Unrep. 510)

MOORE v. MOORE. (No. 9,677.)

Filed August 1, 1885.

1. EVIDENCE, CONFLICT OF—FINDINGS—JUDGMENT AFFIRMED.

Where the evidence is conflicting the findings will not be disturbed, but the judgment affirmed.

2. IMMATERIAL EVIDENCE, EFFECT OF REJECTION OF.

The rejection of immaterial evidence does not constitute error.

Commissioners' decision.

Department 1. Appeal from superior court, county of Butte.

J. W. Turner, Gray & Sexton, for appellant.

Riordan & Freer, for respondent.

FOOTE, C. This cause comes up on appeal from the superior court of the county of Butte. One brother sued another for money alleged to be due on an account. The specifications of error set out that the court below found against the evidence in findings 1, 2, 3, 4, 6, 7, 12, and 13, and that it improperly sustained the plaintiff's objection by his counsel to a question put by defendant's attorney to the plaintiff when on cross-examination as a witness. The evidence in this case on the trial—a jury being waived—was conflicting throughout; but it was sufficient to sustain the findings of the judge below, who saw the parties, and had a better opportunity than this court can have to judge of their relative merits as truthful and fair witnesses, or the contrary. The question put the plaintiff on the stand, when on cross-examination, "as to why he did not include something in Exhibit B," was certainly immaterial to any issue in the case, and the objection to it was properly sustained.

There were other errors complained of, but, as they were not included in the specifications of error below, they cannot be noticed here.

There being nothing in the record to warrant a reversal of the judgment in this case it ought to be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

SUPREME COURT OF CALIFORNIA.

(67 Cal. 272)

BARHAM and others v. HOSTETTER. (No. 9,930.)

Filed August 1, 1885

1. INJUNCTION, DISSOLUTION OF—APPEAL.

Unless an appeal is taken from an order dissolving an injunction within 60 days therefrom, the same cannot be reviewed on appeal.

2. INJUNCTION—DAMAGES—JOINDER OF CAUSES OF ACTION.

A cause of action for injunction, which is common to all the plaintiffs, cannot be joined with a cause of action for damages which is not joint as to all the plaintiffs, but is undoubtedly several.

3. COMPLAINT—DESCRIPTION OF PROPERTY—AMBIGUITY.

For the insufficiency of the description of the property alleged to be affected by acts of the defendant, the complaint in this action held to be ambiguous, unintelligible, and uncertain.

Commissioners' decision.

Department 1. Appeal from superior court, county of Lassen.

E. W. Spencer, for appellant.

A. L. Shinn and *J. D. Goodwin*, for respondent.

FOOTE, C. This was an action brought by 11 plaintiffs to restrain an alleged diversion of the waters of a certain creek by the defendant, and for damages for such alleged diversion. The appeal is prosecuted from the judgment of the trial court in dismissing the action, and from an order dissolving a preliminary injunction. The judgment roll discloses that a demurrer was interposed to the complaint, and that it was sustained; and, the plaintiffs declining to amend upon leave given, the action was dismissed, with costs against plaintiffs. This judgment of dismissal was made on the fourth day of October, 1884; leave to amend for 20 days having been previously given on the twenty-first day of July, 1884.

The preliminary injunction was dissolved on the third day of June, 1884, and the appeal from the judgment and order was not taken until the twenty-second day of January, 1885. The order dissolving the injunction cannot be reviewed here, as the plaintiffs did not take an appeal from that order until far more than 60 days had elapsed. Code Civil Proc. § 956; *McCourtney v. Fortune*, 42 Cal. 387.

The only questions, then, left for discussion are those underlying the judgment of dismissal of the action. Unless the demurrer to the complaint ought to have been overruled, this judgment was undoubtedly right, for the plaintiffs did not avail themselves of the ample opportunity to amend their complaint granted them by the court on sustaining the demurrer. The grounds on which the demurrer was sustained are as follows: (1) That there was a misjoinder of causes of action. (2) That the complaint was ambiguous, unintelligible, and uncertain; for the reason that the real estate and ditches of the plaintiffs were not described with sufficient certainty; and that it did not appear which of two plaintiffs named Barham were interested in

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ditches 10, 11, and 12, as set out in the complaint. The purpose for which the action was instituted, as appears from the body and prayer of the complaint, was to restrain the defendant from depriving the several plaintiffs of water for irrigation purposes, carried by various ditches to certain distinct parcels of land owned, not jointly, but separately, by different plaintiffs, and to recover \$500 damages alleged to have been done to the plaintiffs in the aggregate.

One plaintiff was alleged to be the sole owner of 60 acres of land affected by the deprivation of water caused by the defendant's acts; two plaintiffs alleged to be joint owners of 40 acres, one plaintiff to be the sole owner of 60 acres, another sole owner of 60 acres, another of 100 acres, another of 20 acres, one of 40 acres, two as joint owners of 40 acres, and another as sole owner of 100 acres. The damages claimed in an aggregate sum for all the plaintiffs jointly, was \$500. The cause of action for damages is not joint as to all the plaintiffs, but undoubtedly several; it is joined with a cause of action for an injunction which is common to all the plaintiffs; hence the demurrer upon this point was properly sustained. "There is no more a common interest than though a carrier had at one time carelessly destroyed property belonging to different persons." Bliss, Code Pl. § 76.

The plaintiffs set out in the complaint the number of acres of land they each own; that these lands join each other, and constitute one body of land; and that said land is situated on Baxter creek, and in Lassen county, California. From this description an ordinary inquirer after these lands would be likely to travel up and down Baxter creek for many days, and still be left in the most painful uncertainty as to their exact location; and when it comes to the description of the ditches as set out in the complaint, it is hard to believe that even a professional surveyor could ever successfully locate them. In the complaint there are mentioned as plaintiffs Messrs. T. M. Barham and Charles Barham, and a man named Barham is declared to be a joint owner of ditch No. 10 with other plaintiffs not named Barham, and ditches 11 and 12 are declared to be owned by plaintiffs Dunn and Barham jointly; but as there are two Barhams named as plaintiffs, and the pleader did not deem proper to state which of the two, whether T. M. or Charles Barham, had any interest in those ditches, it is not surprising that as to that matter both the court below and the defendant were left in ignorance. We are of opinion that the court was entirely justified in sustaining the demurrer to the complaint and in dismissing the action. For these reasons we think the judgment, and the order dissolving the preliminary injunction, ought to be affirmed.

WE CONCUR: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(87 Cal. 264)

SULLIVAN v. MIER and others. (No. 9,554.)

Filed August 1, 1885.

SACRAMENTO CITY — STREET ASSESSMENT, FORECLOSURE OF — ACT OF MARCH 16, 1864.

An action for the foreclosure of a street assessment, under the California act of March 16, 1864, against land in the city of Sacramento, must be brought in the name of the people of the state as plaintiffs, and not in the name of the city of Sacramento, and a judgment rendered in an action brought in the name of the latter alone is void, even though it purports to be in favor of the people of the state as well as in favor of the city of Sacramento.

Commissioners' decision.

Department 1. Appeal from superior court, county of Sacramento.

Jones & Martin, for appellant.*Wallace & Hastings*, for respondent.

FOOTE, C. In the trial court, the plaintiff, W. L. Sullivan, sued Fred. Mier and Conrad Zwickel, in an action of ejectment, for a lot of land in the city of Sacramento. The plaintiff introduced in evidence, as part of his chain of title, a judgment roll and a sheriff's deed. The judgment roll disclosed the fact that the complaint was filed and summons issued on the twenty-second day of July, 1864; that the action was commenced on that day. The action was for a delinquent street assessment due the city of Sacramento. The law, by virtue of which such actions could be brought, is to be found on page 183 of the legislative acts of 1863-64, of date March 16, 1864, so that the action under discussion was of necessity governed in its proceedings by the act of March 16, 1864, above referred to.

Upon examination it is discovered that the provisions of that law required in all cases that the complaint should name the "People of the State of California" as plaintiffs, and not the city of Sacramento. It will be found, also, that this act was in relation to suits of a special character, viz.: "For municipal or levee taxes, or street assessments." See section 2 of said act.

The action for delinquent street assessment, by virtue of the proceedings in which, and the judgment had and made therein, the plaintiff in the action of ejectment, now on appeal here, claimed title to the premises involved in that action, was not brought in the name of the "People of the State of California" as plaintiffs, but was brought in the name of the "City of Sacramento," as the complaint, a part of the judgment roll therein, unmistakably shows; nor does it appear anywhere upon the record that any other party was ever legally joined with the city of Sacramento as plaintiff. The cause then proceeded to judgment, and the judgment, or decree of foreclosure and order of sale in the action, was entered in favor of the people of the state of California and the city of Sacramento as plaintiffs. If the court which rendered this judgment, or decree and order of sale, had no jurisdiction to do so, then they were void. The action was a special one in its nature, and this court said, in *Richardson v. Tobin*, 45 Cal. 30, which was an action for a street assessment:

"The counsel for the defendant also raises the point that it was not within the constitutional power of the legislature to prescribe the requirements of a complaint in this class of actions. But we apprehend the counsel does not seriously urge this point, after the admission in his reply brief that 'after the most thorough investigation of all the works on constitutional law, and of the latest digests, there can be found no law limiting the powers of the legislature to regulate the pleadings' in cases like the present."

The law which prescribed in what name such an action should be brought, and which prohibited a certain corporation, viz., the city of Sacramento, from being named as plaintiff, was constitutional. But the Sixth district court of the state of California, sitting in and for the county of Sacramento; rendered a judgment, or decree and order of sale, in the tax assessment suit, in favor both of the city of Sacramento, which was alone a party plaintiff to the action, and also in favor of the people of the state of California, who never were in any way legally made parties to the suit. If the judgment, or decree and order of sale, had been in favor of the city of Sacramento alone, following the complaint in the action which named said city only as plaintiff, they would have been void, because the court could by law entertain such suit only when brought in the name of the people of the state of California. But it went further: it not only rendered a decree and made an order of sale in favor of the city of Sacramento, when it had no jurisdiction of such an action unless brought in such plaintiff's name, as the act of March 16, 1864, prescribed, but it joined in said decree of foreclosure and order of sale the people of the state of California as plaintiffs, when such plaintiffs have never been made by any legal steps parties to that action; thus attempting to render a judgment against a defendant in favor of a plaintiff who had never instituted an action against him. From this it follows that the decree of foreclosure and order of sale, through which the plaintiff claimed title, are utterly void, as is the deed of the sheriff thereunder. "The purchaser at a sale on execution under a void judgment finds himself without title." *Freem. Ex. § 20; Emeric v. Alvarado*, 64 Cal. 590.

The conveyances which the plaintiff introduced in evidence as mesne conveyances subsequent to the void sheriff's deed, of course conveyed no title, being based upon that deed.

There are other errors alleged to have taken place on the trial below, but we need not notice them, since the plaintiff, by his own evidence, has shown his title to have no existence. The judgment and order denying the motion for new trial in this case ought to be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(57 Cal. 275)

ORR v. STEWART. (No. 9,617.)

Filed August 1, 1885.

1. ACTION TO QUIET TITLE—GOVERNMENT TITLE.

An action to quiet title to land may be maintained in this state notwithstanding the fact that the title thereto is still in the United States government.

2. FORECLOSURE OF MORTGAGE—AFTER-ACQUIRED TITLE.

On mortgage purporting to convey the land in fee, any after-acquired title on the part of the mortgagor will feed the mortgage and inure to the benefit of the mortgagee; so, even though the title when the mortgage was made was in the government, and was acquired by patent from the government after the foreclosure of the mortgage.

3. MORTGAGE OF HOMESTEAD ENTRY—VALIDITY.

The voluntary mortgage by the grantee of his homestead entry is not prevented or invalidated by section 2296, U. S. Rev. St., concerning homesteads.

Commissioners' decision.

Department 1. Appeal from superior court, county of Siskiyou.

Nicols & Abels, for appellant.

J. S. Beard and *J. Brown*, for respondent.

BELCHER, C. C. In January, 1870, the defendant, Stewart, made a homestead entry in the proper United States land-office upon 160 acres of public land in Siskiyou county, under the provisions of the homestead act of 1862. In December, 1875, he mortgaged the land, with its appurtenances, to the plaintiff, Orr, to secure the payment of his promissory note for \$2,000. The mortgage was made in the form given in section 2948, Civil Code. In December, 1880, Orr commenced an action to foreclose his mortgage, and on the seventh of February following, after a trial, obtained judgment for \$4,106, and decree of foreclosure and sale. Under this decree the mortgaged property was sold by the sheriff on the fifth day of March, 1881, and bid in by Orr, and on the tenth day of September, 1881, he received the sheriff's deed. Possession of the property was surrendered to him on the same day he received his deed. A few days later, Orr conveyed the premises to one Cunningham, and on the fifth of November, 1883, Cunningham and wife reconveyed to Orr. In October, 1883, Stewart went to the United States land-office and was there permitted to commute his homestead entry into a cash entry, and he accordingly then paid the government price for the land in full, and received a duplicate receipt and certificate of purchase therefor. From the time he obtained possession under his sheriff's deed, Orr and his grantor remained in possession of the land up to the time when this action was tried.

This action was commenced by Orr to quiet his title to the said land, and to certain water-ditches and water-rights alleged to be appurtenant thereto. The defendant answered, denying that the plaintiff owned, or was entitled to the possession of, the land or its appurtenances, and setting up his proceedings in the land-office to acquire the title. The case was tried by the court, and the facts found to be substantially as above stated; but judgment was entered in favor of

the defendant upon the grounds, as shown by the conclusions of law : "(1) That the legal title to the land in controversy in this action, and to quiet which plaintiff has brought this action, is in the government of the United States. (2) The fact that plaintiff is in possession under the decree of foreclosure and proceedings thereunder had, or that he obtained such title as defendant had at the time the mortgage was given, and decree made and entered in the former suit between these parties, does not entitle him to judgment in this action for said land or ditches or appurtenances. (3) That this court cannot, by its judgment and decree, restrain the defendant from proceeding to acquire title under his homestead entry from the government of the United States. (4) That to entitle the plaintiff to recover said land, he must possess a title superior to that of the defendant, and, of course, superior to that of the United States, or he must possess equities which will control the title in defendant's name, and which he cannot do in this action, defendant not having acquired title from the government of the United States." The plaintiff appealed from the judgment, and the case comes here on the judgment roll.

The appellant contends that these conclusions of law are not the correct conclusions to be drawn from the facts, and that the judgment is, therefore, not supported by the findings. It is settled law in this state that an action to quiet title to a parcel of land may be maintained, notwithstanding the title to the land is still in the government of the United States. *Brandt v. Wheaton*, 52 Cal. 430; *Wilson v. Madison*, 55 Cal. 5. It is also well settled that when a mortgage of land is made, purporting to convey the land in fee, any title afterwards acquired by the mortgagor will feed the mortgage and inure to the benefit of the mortgagee, (*Clark v. Baker*, 14 Cal. 612; *Kirkaldie v. Larrabee*, 31 Cal. 455; *Sherman v. McCarthy*, 57 Cal. 507;) and this is so, though the title when the mortgage was made was in the government, and was afterwards acquired by patent from the government. *Cristy v. Dana*, 42 Cal. 174; *Camp v. Grider*, 62 Cal. 20. The reason for the rule is said in *Clark v. Baker*, *supra*, (p. 633,) to be that the relation of the mortgagor is "one which requires him to preserve the property for the purpose of the security for which it was originally pledged; and hence, to insure good faith and fair-dealing, he is forever precluded from denying the existence of the lien which he has attempted to create, or defeating its enforcement against the property upon which it was placed." Counsel for respondent do not question the rule as above stated, but they insist that it applies only when the outstanding title is acquired by the mortgagor before foreclosure of the mortgage, and that any title acquired by him after foreclosure and sale is not affected by it. In this counsel are mistaken. In *Vallejo Land Ass'n v. Vierra*, 48 Cal. 572, the same objection was raised, but the ruling was against the views of the respondent here. That case was ejectionment, and the plaintiff's title to the land involved originated in a sheriff's deed given after a

foreclosure and sale of mortgaged property. At the time of the foreclosure the title was in the government, but it was afterwards acquired by the defendant, who had been the mortgagor. The court said:

"The rule that a sheriff's deed delivered upon execution sale imparts no warranty of title, but transfers to the purchaser only such estate as was held at the time by the defendant in execution, has no practical application to a sheriff's deed delivered upon foreclosure of a mortgage in fee; for, as we have seen already, the defendant in the latter case must continue to be estopped, by the terms of the mortgage deed itself, to deny that the estate was other or less than an estate in fee in the premises. These terms, importing a conveyance of the fee, are equivalent to a covenant of general warranty of title running with the land. We are therefore of opinion that the plaintiff is vested with the legal title to the premises in controversy."

But, if this be so, counsel still insist that the plaintiff cannot maintain this action, for the reason that his mortgage was taken in violation of section 2296 of the Revised Statutes of the United States, concerning homesteads, and was therefore void and of no effect. That section reads as follows:

"No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

The same section was invoked in *Kirkaldie v. Larrabee*, 31 Cal. 455, to defeat the mortgage then sought to be foreclosed, but it was held not to apply to voluntary conveyances or mortgages in fee. The court said:

"There is nothing in the homestead act of 1862 forbidding a voluntary alienation by the grantee under that act. The same principle applies to a mortgage of the fee. *Clark v. Baker*, 14 Cal. 630. The title will pass, not merely in consequence of the enforcement of the payment of a debt by the ordinary process of the courts, but in consequence of the voluntary contract of the party in executing the mortgage. The mortgagor of the fee is estopped from denying the existence of the lien which he has attempted to create, and from defeating, by his own act, the enforcement of the lien against the property thus mortgaged."

When the plaintiff's mortgage was executed, the Code (Civil Code, § 2930) provided that "title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution." It was a voluntary mortgage in fee, and was not made void or voidable by any provision of the homestead act. It follows that the plaintiff had the right to maintain his action, and to have his title to the land in controversy quieted, as against any title which the defendant has acquired or may acquire from the government or otherwise, and that the court erred in rendering judgment for the defendant.

The judgment should be reversed and the cause remanded.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reason given in the foregoing opinion the judgment is reversed and the cause remanded.

(57 Cal. 289)

LUHRS, Assignee, etc., v. KELLY. (No. 9,639.)

Filed August 12, 1885.

1. INSOLVENCY PROCEEDINGS—JURISDICTION—COLLATERAL ATTACK.

A court acquires jurisdiction in an insolvency proceeding where the petition is properly signed, verified, and filed, and a copy thereof, together with a copy of the order to show cause, is regularly served on the debtor in the manner provided by law for the service of summons in civil actions, and its proceedings cannot be collaterally attacked for errors committed, such as the filing by the assignee of a bond in an amount less than that ordered by the court.

2. INSOLVENCY—ASSIGNMENT—RIGHT OF ASSIGNEE TO SUE.

A certified copy of an assignment in insolvency is conclusive evidence of the assignee's authority to sue under the California insolvency act of 1880.

3. WITNESS—IMPEACHMENT FOR HOSTILITY.

Where a witness has testified to material matters, the party against whom he has testified may, on cross-examination, show prejudice or hostility on the part of such witness, but such evidence is only admissible where the witness has testified to material matters.

Commissioners' decision.

Department 1. Appeal from superior court, Sacramento county.

Grove L. Johnson, for appellant.

Freeman & Bates, for respondent.

BELCHER, C. C. This is an action commenced by the plaintiff as assignee of one S. J. Dierssen, an insolvent debtor, to recover the value of four barrels of whisky, and certain other personal property, alleged to have been transferred by the insolvent to the defendant in violation of the provisions of section 55 of the insolvent act of 1880. The insolvency proceedings were involuntary, and every step taken in them was alleged in the complaint and denied in the answer. When the case came on for trial the plaintiff offered in evidence the petition in insolvency, the bond accompanying the petition, the order to show cause, with the return of service thereof on the respondent, the order adjudging the respondent to be an insolvent debtor, and requiring him to file a schedule and inventory of his property, with the return of service thereof, the order appointing the plaintiff assignee, the bond of the assignee, and a certified copy of the assignment made by the clerk of the court to the plaintiff as assignee. The defendant objected to the evidence upon the ground that it was irrelevant and immaterial, and that the proceeding did not conform to the requirements of the insolvent law. The court overruled the objections, and admitted the evidence. We see no error in the rulings. The petition was properly signed, verified, and filed. A copy of the petition, and a copy of the order to show cause, were regularly served on the debtor in the manner provided by law for the service of summons in civil actions. This gave the court jurisdiction of the case, (*Ohleyer v. Bunce*, 3 PAC. REP. 105,) and for errors afterwards committed its proceedings could not be assailed collaterally. The order to show cause required the debtor to appear on the twenty-eighth day of December. He did not appear, and the order adjudging him an insolvent

ent was entered on the third day of January. There was nothing in this delay of which the defendant could take advantage.

As appears by the record, the order appointing the plaintiff assignee, required him to give a bond in the sum of \$2,000. On the next day he gave a bond in the sum of \$500, and it was approved by the judge and filed. In the assignment made by the clerk it is recited that the assignee had "filed a bond in the sum of \$500, as ordered by the court." There was here evidently some mistake, but it was one which did not concern the defendant. The creditors and debtor were alone interested in the amount and sufficiency of the bond, and they acquiesced in the bond given. The court had jurisdiction, and its approval of the bond was sufficient to justify and make valid the assignment as against a mere collateral attack. A further and conclusive answer to all these objections is found in the fact that section 18 of the act provides that, "in suits prosecuted by the assignee, a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue." Under this provision it was unnecessary for the plaintiff to allege or prove the various steps taken in the insolvency proceedings. He might have alleged his ownership of the property and proved the fact, so far as it could be proved by the record, by producing a certified copy of the assignment made to him. The law does not intend that, in actions commenced by the assignee to recover the property of the estate, the questions arising in the progress of the insolvency proceedings shall be open to review and retrial. Still there was no error prejudicial to the defendant in admitting proof of all those proceedings. *Dambmann v. White*, 48 Cal. 439; *Rogers v. Stevenson*, 16 Minn. 68 (Gil. 56;); *Cone v. Purcell*, 56 N. Y. 649; *Shawhan v. Wherritt*, 7 How. 627.

In the progress of the trial plaintiff was called as a witness in his own behalf, and testified that he "was acquainted with the value of groceries; that whisky, on the twenty-fifth day of November, 1882, and now, was worth at least \$1.25 per gallon; that Miller whisky was worth \$2.25 per gallon; that a barrel contained from forty to forty-five gallons; that he had known S. J. Dierssen for a good many years; that Dierssen was a retail grocer on and prior to November 25, 1882, and carried a stock in trade amounting to from \$1,200 to \$1,500 in value." On his cross-examination the witness testified that he had a conversation with one George Dierssen, a brother of S. J. Dierssen, at a certain time and place, and was then asked: "In the course of that conversation did you tell him that you would let up on Louis Dierssen if he would testify against Kelly in this case; that you would let up on him and not prosecute him?" The question was objected to by counsel for plaintiff upon the ground that it was irrelevant, and the objection was sustained. The defendant then made an "offer to show that this witness openly attempted to bribe witnesses by promises of immunity." This offer was also objected to as irrelevant, and excluded, and to these rulings the defendant excepted.

Undoubtedly, when a witness has testified to matters material to the issues, the party against whom he has testified may, in the cross-examination, show that the witness is hostile to or prejudiced against him, (*People v. Wasson*, 4 PAC. REP. 555; Greenl. Ev. § 450,) and to that end may lay the foundation for showing that the witness has attempted to buy or bribe other witnesses. But this can only be done when the witness has testified to material matters. Were the matters testified to by the witness in this case material? The testimony above quoted is all the testimony in the case which is found in the record. There was no issue as to the fact that Dierssen was a retail grocer, and carried a stock in trade amounting to from \$1,200 to \$1,500 in value.

In the complaint it is alleged that Dierssen transferred to the defendant four barrels of whisky, of the value of \$500, and in the answer it is admitted that he transferred four barrels of whisky of the value of \$300. Nothing appears in the pleadings or elsewhere as to the kind or quality of the whisky. It would seem, therefore, that when the witness testified that whisky was worth \$1.25 per gallon, and a barrel contained from 40 to 45 gallons, he was testifying to no more than was admitted by the defendant. Besides, the value of all the property transferred, as found by the verdict of the jury, was only \$400, and no complaint is made that the damages are excessive. On the whole, we are unable to see that the court committed any material error in the rulings complained of. The court instructed the jury very fully upon every question in the case. These instructions stated the law of the case fairly and clearly, and we fail to see that they were either contradictory or misleading. Several instructions asked by the defendant were refused, but we think, in so far as they were sound as propositions of law, they were embraced in other instructions given. It would subserve no useful purpose to speak of each of them separately.

The judgment and order should be affirmed.

WE CONCUR: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(67 Cal. 283)

BELL v. McCLELLAN. (No. 9,909.)

Filed August 12, 1885.

FRAUDULENT SALE—CHANGE OF POSSESSION TO CONSTITUTE.

Sale, which is not accompanied by actual and continued change of possession, is void as against creditors of the vendor.

Commissioners' decision

Department 1. Appeal from superior court, Butte county.

A. F. Jones, T. L. Ford, and Reardon & Freer, for appellant.

Gray & Sexton, for respondent.

BELCHER, C. C. This is an action to recover the possession or value of two hay-presses. It appears that the presses were the property of one Duncan, and were stored on the farm of McNulty, his brother-in-law. On the nineteenth day of January, 1884, Duncan sold the presses to the plaintiff in satisfaction of an indebtedness then due from him to the plaintiff. The plaintiff received a bill of sale of the presses, and immediately wrote to McNulty, stating that he had bought them from Duncan, and asking McNulty to hold them for him. Duncan gave McNulty no notice of the sale. The presses remained stored in McNulty's shed till the second day of June, 1884, when the plaintiff again wrote to McNulty, telling him to let Duncan take them and use them. Under this permission Duncan took the presses, had them repaired at a blacksmith's shop, and used them to bale hay on his own account until the twenty-ninth day of August following. He hired the men, paid them, contracted with parties for baling, and received pay therefor. McNulty was one of the men employed by him, and had charge of one of the presses. On the twenty-ninth of August, Duncan and McNulty went to the plaintiff's store at Oroville, and Duncan then told the plaintiff that he was sick, and did not want the presses any longer, and the plaintiff told McNulty to take them and continue to bale hay with them for him. McNulty took the presses, and continued baling hay with them for the plaintiff till the fourth of September. On that day they were taken from him by the defendant, acting as sheriff, under a writ of attachment issued out of the superior court in an action commenced by one Davidson against Duncan. Plaintiff never saw the presses, and never took or held possession of them, except as above shown. Davidson never heard of the sale of the presses until the twenty-ninth of August, when Duncan told him he had sold them to the plaintiff in January.

Upon these facts the court below found "that the sale of said presses by C. M. Duncan to plaintiff was made in good faith, accompanied by an immediate delivery, and followed by an actual and continued change of possession, and that plaintiff was on the commencement of this action the legal owner of, and entitled to the possession of, the same." The appeal is by the defendant from the judgment and order denying his motion for new trial.

Conceding that the sale was made in good faith, and was accompanied by an immediate delivery, notwithstanding no notice of the sale was given by Duncan to McNulty, still the appellant insists that it was not followed by an actual and continued change of possession, as required by section 3440, Civil Code. In *Stevens v. Irwin*, 15 Cal. 506, it is said:

"The delivery must be made of the property. The vendee must take the *actual* possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous; not taken to be surrendered back again; not formal, but substantial. But it need not necessarily continue indefinitely, when it is *bona fide* and openly taken, and is kept for such a length of time as to give general advertisement to the *status* of the property, and the claim to it by the vendee."

In *Cahoon v. Marshall*, 25 Cal. 201, it is said:

"What constitutes an actual change of the possession of personal property, as distinguished from that which, by mere intendment of law, follows the transfer of title, is not of difficult solution. It is an open, visible change, manifested by such outward signs as render it evident that the possession of the vendor has wholly ceased." See, also, *Godchaux v. Mulford*, 26 Cal. 316, and *Hesthal v. Myles*, 53 Cal. 623

In *Stevens v. Irwin* the vendee took immediate possession of the property, and held the open, visible, and notorious possession thereof for more than a year, and it was held that the length of time was sufficient to give general advertisement to the world of the *status* of the property. Here there was no open, visible change of possession, and the constructive possession which the plaintiff took lasted only from January to June. This was a time when there was little or no occasion to use hay-presses; but when the haying season returned, and there was hay to be baled, the presses were again found in the open, visible possession of the vendor, and they so remained, and were used by him on his own account, for nearly three months. We are unable to see how this can be held to be the actual and continued change of possession which the law requires to make the sale valid as against creditors. It is suggested by counsel for respondent that the question whether the possession is actual and continued as against a creditor is one which must ordinarily be determined by the jury, and that when the testimony is conflicting upon the subject the judgment should not be reversed. The answer is that the testimony here is not at all conflicting, and that, upon the facts as stated, it is simply a question of law whether they show an actual and continued change of possession or not.

We think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

(87 Cal. 286)

CLARY v. HAZLETT and others. (No. 9,776.)

Filed August 12, 1885.

1. PUBLIC LANDS—UNAUTHORIZED RESERVATION IN PATENT VOID.

A reservation or condition in a United States patent to land, which is not authorized by law, is void.

2. SAME—PATENT TO PLACER CLAIM—RESERVATION OF VEIN OR LODE.

A reservation in a patent to a placer claim that, "should any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, led, tin, copper, or other valuable deposits, be claimed or known to exist within the above-described premises, at the date thereof, the same is expressly excepted and excluded from these presents," is authorized and valid, and in such case no title will vest in the patentee as to such vein or lode.

Commissioners' decision.

Department 1. Appeal from superior court, Siskiyou county.

Wm. McConaughy, for appellant.

A. B. Gillis and H. B. Warren, for respondent.

SHEARLS, C. Action to recover damages for trespass upon mining claims, and for injunction against defendants to restrain them from similar trespasses. Plaintiff bases his action upon a patent issued to him for the *locus in quo* as a placer mining claim, under the provisions of chapter 6, tit. 32, Rev. St. U. S. Plaintiff's claim is known as the "Ellis Placer Mining Claim," and within the exterior limits thereof there is a regularly defined lode of gold-bearing quartz rock in place, which was known to exist at the time of plaintiff's application for a patent; and his application did not include an application for the lode. The patent to plaintiff contained the usual reservation in such cases, viz.:

"That should any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, led, tin, copper, or other valuable deposits, be claimed or known to exist within the above-described premises at the date hereof, the same is expressly excepted and excluded from these presents."

The land upon which the alleged trespasses were committed consisted of this quartz lode, which was located by the grantor of defendants in 1879, under the name of the "California Queen Mine," and work by said defendants upon the quartz lode as situate and located constitutes the supposed trespasses complained of. Defendants had judgment, and plaintiff prosecutes this appeal.

The question in the case upon which the decision must turn is whether, by his patent to the Ellis placer mining claim, the plaintiff acquired title to said quartz lode or vein. Section 2333, Rev. St. U. S., provides as follows:

"Where a vein or lode, such as is described in section 2320, is known to exist within the boundaries of a placer claim, an application for a patent of such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the

placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The preceding portion of the same section provides that the applicant for a patent, being in possession of a placer claim, and also of a vein or lode claim, included within the boundaries thereof, may, upon application therefor, and upon paying five dollars per acre for the lode claim therein, obtain patent for the whole. Appellant contends that the condition in the patent, "that should any vein or lode of quartz, or other rock in place, bearing gold, * * * be claimed or known to exist within the above-described premises at the date hereof, the same is expressly excepted and excluded from these presents," is void. It must be conceded that where a patent contains a reservation or condition not authorized by law, such reservation or condition is a nullity. *Stark v. Starrs*, 6 Wall. 402; *Wolfley v. Lebanon Min. Co.* 4 Colo. 115.

The land department is but an instrument by which the objects of the law are attained; its jurisdiction and mode of procedure are defined by law, and its results must be such as are warranted by the paramount authority under which it acts. Assuming this hypothesis as correct, it becomes necessary to inquire whether the clause quoted from section 2333 authorizes the reservation in the patent to plaintiff. Upon this question we do not entertain a serious doubt. The language of section 2333—in cases of known lode claims in placer mines applied to be patented, and which lode claims are not sought to be patented—is explicit, and such omission "shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim." If he has no right of possession, it must follow that he has no right to a patent. Congress has provided the manner in which a right to possession of mining claims may be acquired, and has further provided for the issuance of patents to those who have acquired such right to possession,—has provided that, in case of adverse claims, he who substantiates his right to possession shall thereupon be entitled to a patent. And when the language in question is considered in connection with the context, and with the other provisions of the mining law, the conclusion is reached that by the waiver of his right to possession a waiver of his right to a patent is implied. The latter is a sequence of the former, and cannot exist without it. By this construction the harmony of the whole section is maintained, while the interpretation claimed by counsel for appellant would permit an applicant for patent to acquire title to a quartz claim at \$2.50 per acre, instead of \$5, as provided by law, and would render the latter clause of the same section, under which unknown quartz lodes pass to the patentees of placer mines, unnecessary. We conclude the exception and exclusion of the quartz lode in question, as specified in the patent, was authorized by law, and that

no title thereto vested in the appellant under his patent. There is substantially a finding by the court below upon all the issues made by the pleadings in the case.

It is not necessary that the facts as found should follow the language of the pleadings which they support. If the truth or falsity of each material allegation not admitted can be demonstrated from the findings, the requirements of the Code are met.

The judgment should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(67 Cal. 279)

MELONE v. DAVIS. (No. 9,943.)

Filed August 12, 1885.

ESTATES OF DECEDENTS — ACTION FOR DISTRIBUTIVE SHARE — DEMAND ON ADMINISTRATOR.

Action should be brought against administrator individually, and not in his official capacity, to recover a distributee's share in the estate of a decedent, under a decree of distribution ordering the payment of the same within a certain time, which time has elapsed without such payment; and no demand on defendant as administrator, and refusal to pay, need be alleged, the suit being a sufficient demand.

Commissioners' decision.

Department 1. Appeal from superior court, San Joaquin county.

J. H. & J. E. Budd, for appellant.

August Muenter, for respondent.

SEARLS, C. Defendant was administrator of the estate of one Joseph M. Davis, deceased. His final account as such was rendered, settled, and a decree of distribution made by the court. This action is brought to recover the amount or sum distributed to plaintiff by that decree, and which was, by the terms of the decree, ordered to be paid by the administrator within 10 days from September 20, 1881. The cause was tried by the court, who filed findings in writing, and rendered judgment thereon in favor of plaintiff. Defendant appeals from the judgment, and the case comes up on the judgment roll.

Two points are urged by appellant: *First*, that the findings fail to show that a demand for payment was made upon defendant before suit was brought; *second*, that no action can be maintained against defendant as an individual until demand on him as an administrator and refusal to pay.

One who receives money, standing in the position of a trustee, is, in general, not liable in an action for money received until demand is made, or some breach of trust or duty committed. *Walrath v. Thompson*, 6 Hill, 540. In the present case the money was received

as administrator, and when the decree of distribution was made by the court, requiring defendant, within 10 days, to pay plaintiff the sum of money awarded her, and to make to her the assignments provided to be made to her, it became and was the plain duty of defendant to comply with the terms of the decree, and having for nearly three years failed so to do, he was guilty of a breach of duty, and no demand was necessary before suit brought. The decree of distribution had, in most respects, all the efficacy of a judgment at law or a decree in equity. It would have been enforced by proceedings for contempt. *Wheeler v. Bolton*, 54 Cal. 302. An action could be maintained upon it for non-compliance with its requirements, and we see no greater necessity for a demand than exists in case of suit upon an ordinary judgment at law, or before issuing execution upon a judgment. Defendant was liable in contempt for not making payment under the decree, and, as to him, suit brought was a sufficient demand. *Cummings v. Howard*, 63 Cal. 503.

2. The action was properly brought against defendant individually.

In actions against administrators and executors, founded upon promises made by the testator or intestate during his life, the defendant must be sued in his representative character. He may plead *plene administravit*, and the judgment will be, not against him personally, but *de bonis testatoris*. Not so, however, when an administrator or executor is sued upon his own promise or obligation, made or incurred after the death of the testator or intestate; it is not necessary to name the defendant as executor or administrator, though it has been held it may be done by way of description, but he may be proceeded against individually, and a judgment *de bonis propriis* had. *Waldsmith v. Waldsmith*, 2 Ohio, 156. No action can be maintained against an administrator *as such*, that is founded upon malfeasance or misfeasance, or for a tort. *Eustace v. Jahns*, 38 Cal. 3. A claim against the estate must be presented to the administrator for allowance before suit brought. This was not a claim *against* the estate, but a demand for a part of the estate. Defendant had been the administrator; as such he had taken all the steps necessary to a distribution of the fund in hand. The court had made its decree requiring him to distribute to plaintiff the property and money sought in this suit. By refusing to comply with the decree he became personally liable to plaintiff, as in case of *devastavit*.

The hardship of paying taxes on the property since 1881, complained of by counsel for appellant, is not entitled to consideration, in view of the fact that had appellant performed his duty by distributing the property as ordered by the court, the taxes thereon would not have devolved upon him to pay.

Like considerations are applicable to the complaint against the interest awarded by the court below.

We are of opinion the judgment of the court below should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(87 Cal. 293)

SACRAMENTO LUMBER CO. v. WAGNER and others. (No. 9,615.)

Filed August 12, 1885.

MARRIED WOMAN—CONTRACT OF, TO PAY ANOTHER'S DEBT.

A married woman is capable of entering into a contract to pay certain debts of her husband, as part consideration of a tract of land, and such contract need not be in writing, under the statute of frauds, and her husband's creditors, in whose favor such promise is made, can maintain an action thereon, though they were not parties to the agreement.

Commissioners' decision.

Department 1. Appeal from superior court, Sacramento county.

J. H. McKune, for appellant.

Freeman & Bates, for respondent.

BELCHER, C. C. The defendants, being husband and wife, bought the real property mentioned in the complaint in February, 1881. At the time of the purchase the defendant Helena paid one-third of the purchase price with money which was her separate property, and for the other two-thirds they gave their joint promissory note. Shortly after the purchase they commenced to erect a building on the premises, and obtained lumber and material therefor from the plaintiff. The lumber and materials furnished were charged to John Wagner, the husband. On the fourth day of April, 1881, the defendants reconveyed the property to Michael Wagner, their grantor, who held it until the eleventh day of July following, and then, for the expressed consideration of one dollar, conveyed it back to defendant Helena. Between April 4th and July 11th the construction of the building was continued, and materials therefor were furnished by the plaintiff, and by Hartwell, Hotchkiss & Stalker, and charged to John Wagner. At the time of the conveyance to her, on the eleventh of July, defendant Helena agreed to pay the bills against the property, including the bills due the plaintiff and Hartwell, Hotchkiss & Stalker, and this, she told the scrivener who drew the deed, was a part of the consideration of the deed to her. On the same day she went with her husband to the plaintiff's managing agent and told him that she owned the property and was going to pay all the bills, and wanted to know how much discount the plaintiff would allow her if she paid the cash. She also went with her husband to the place of business of Hartwell, Hotchkiss & Stalker, and asked for their bill, and said she was going to pay it. The bills not being paid, Hartwell, Hotchkiss & Stalker assigned their bill to the plaintiff, and this action was brought to recover the amount of the two bills. The defendant John appeared, and consented that judgment be taken against him as prayed for in the complaint. The defendant Helena answered with a general denial and a plea of cov-

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erture. The case comes here on an appeal by the defendant Helena from the order denying her motion for a new trial.

The fact that the appellant was a married woman cannot avail her in this case. She was not disqualified by reason of coverture from entering into a contract of the character indicated in the record. In this state "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried." Civil Code, § 158. The appellant accepted a conveyance of the property, and as a part consideration for that conveyance promised to pay the bills sued on. Even if the obligation to pay them rested on John Wagner or Michael Wagner alone, still the appellant's promise to pay them was not void because not in writing signed by her. Section 2794, Civil Code, provides:

"A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: * * * (3) Where the promise, being for an antecedent obligation of another, is made * * * upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation or from another person."

It is claimed that the debt was the obligation of John Wagner, and that a promise made to John Wagner or Michael Wagner could not operate as a promise to the plaintiff, or to Hartwell, Hotchkiss & Stalker, on which they could sue, for the reason that there was no privity between the parties. The same point was made and maintained in *McLaren v. Hutchinson*, 18 Cal. 80. The court said:

"In this case the defendant purchased of one Beach a tract of land, and, as a part of the consideration, agreed to pay certain debts specified in the complaint. Neither the plaintiff nor any of the persons to whom the debts were owing were parties to the agreement, and it does not appear that they ever assented to, or attempted in any manner to connect themselves with, the transaction prior to the commencement of the suit. The plaintiff is the present holder of these debts, and the question is whether he can maintain an action against the defendant for their recovery. It is clear, we think, that he cannot. There is no privity between the parties, and the legal position of the plaintiff is that of a stranger to the agreement."

The same point was again made in *Lewis v. Covillaud*, 21 Cal. 189; and, speaking of *McLaren v. Hutchinson*, the court said:

"In that case the suit was upon an agreement made by the defendant with a third person to pay a debt owing by the latter to the plaintiff, and we held that, as the plaintiff was not a party to the agreement, the action could not be maintained. The decision was placed upon the ground that there was no privity, but since the case was decided the matter has frequently been called to our attention, and we are by no means satisfied with the rule laid down. The agreement was founded upon a sufficient consideration, and the modern doctrine in such cases seems to be in favor of the maintenance of the action."

We are satisfied that an action like that described in *McLaren v. Hutchinson* may be maintained, and that the court did not err in this case in rendering judgment in favor of the plaintiff. *Barker v. Bucklin*,

2 Denio, 45; *Delaware & H. Canal Co. v. Westchester Co. Bank*, 4 Denio, 97; *Lawrence v. Fox*, 20 N. Y. 268; *Turk v. Ridge*, 41 N. Y. 206; *Barker v. Bradley*, 42 N. Y. 316; *Arnold v. Lyman*, 17 Mass. 400.

The order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

WHITMORE v. HENDERSON. (No. 8,706.)

Filed August 3, 1885.

APPEAL—JUDGMENT AFFIRMED.

For failure of appellant to file points and authorities, judgment affirmed; and it appearing that the appeal was without merit, damages imposed.

Department 2. Appeal from superior court, Stanislaus county.

R. B. Treat and *W. L. Dudley*, for appellant.

W. E. Turner and *D. S. Terry*, for respondent.

By THE COURT. Appellant having failed to file his points and authorities within the time granted, we think the judgment should be affirmed.

(2 Cal. Unrep. 511)

(Order entered August 11, 1885.)

By THE COURT. Ordered that the judgment entered in this cause by this court, August 3, 1885, be amended by inserting, after the words "the judgment should be affirmed," the words, "and it appearing that the appeal was without merit, and was taken for delay, damages in the sum of \$250 should be imposed in favor of respondent and against appellant." So ordered.

HAMILL v. LITTNER. (No. 9,800.)

Filed August 12, 1885.

1. SUBMISSION ON AGREED STATE OF FACTS—FINDINGS.

Findings are not necessary in a case submitted on an agreed statement of facts.

2. MORTGAGE—PAYMENT OF TAXES BY MORTGAGOR—JUDGMENT AFFIRMED.

On authority of *Huy v. Hill*, 4 PAC. REP. 378, judgment affirmed.

Commissioners' decision.

Department 1. Appeal from superior court, Sacramento county.

Freeman & Bates, for appellant.

A. P. Catlin, for respondent.

BELCHER, C. C. This case was submitted to the court below upon an agreed statement of the facts, and findings were, therefore, not nec-

essary. Besides, the court, in its decision of the case, recited the facts substantially as they were agreed to, and these facts, and the conclusions of law thereon, were separately stated. The exact point involved in this case was decided in *Hay v. Hill*, 4 Pac. Rep. 378. We are satisfied that that decision was right. Upon the authority of that case, the judgment here should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(67 Cal. 319)

In re Estate of LUTHER, Deceased. (No. 9,522.)

Filed August 21, 1885.

ESTATES OF DECEDENTS—FAMILY ALLOWANCE.

An order refusing to make a family allowance out of the estate of a decedent is not erroneous, if it appears that a homestead had been set apart to the widow and children, and the petition for the family allowance fails to state that such homestead is insufficient for the support of the family.

Commissioners' decision.

Department 2. Appeal from superior court, Stanislaus county.

Schell & Bond, for appellant.

E. T. Stone, for respondent.

FOOTE, C. Appeal from an order refusing to make a family allowance to the widow and minor children of deceased. A homestead consisting of 125 acres of farming land, also some personal property, had been set apart to the widow and children. The petition for family allowance did not contain a statement that the proceeds of the farm were insufficient. Therefore we cannot say that the court erred in refusing the allowance, and the order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

(67 Cal. 313)

CLUNIE v. SACRAMENTO LUMBER CO. (No. 9,753.)

Filed August 19, 1885.

1. FINDINGS—CONFLICTING EVIDENCE.

Findings of fact based on conflicting evidence ought not to be disturbed unless some evidence was improperly admitted which was injurious to the losing party.

2. EVIDENCE—DECLARATIONS OF AGENT—ADMISSIBILITY AGAINST PRINCIPAL.

Declarations made by an agent after the act to which they relate, do not bind the principal, are not part of the *res gesta*, and not admissible in evidence.

Commissioners' decision.

Department 1. Appeal from superior court, Sacramento county.

Freeman & Bates, for appellant.

A. P. Catlin, for respondent.

FOOTE, C. The plaintiff seeks to enforce the specific performance of a verbal agreement by compelling the defendant to execute a lease of certain premises for the term of five years. The findings of the court upon the facts, the evidence being conflicting, ought not to be disturbed, unless something was improperly admitted which was injurious to the defendant. It is claimed by counsel that the statements and declarations of Goodhue, the defendant corporation's general manager, made after his verbal agreement to lease for his principal the premises about which this contention is had, were incompetent as evidence to bind such principal, since they were narrations of facts which occurred at the time the agreement was entered into. The evidence discloses the fact that those declarations and statements on the part of Goodhue were made a year or two after the alleged parol agreement for the lease of five years was consummated by him for his principal with the plaintiff, and that they set out and stated the terms and tenor of such agreement as understood by the parties thereto at the time of its completion. We are of opinion that it was not proper to admit in evidence such declarations so made by the agent, as they did not bind his principal, not being a part of the *res gestæ*, and for this reason the judgment and order denying a new trial should be reversed, and a new trial granted.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reason given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

In re PATTERSON. (No. 20,117.)

Filed August 20, 1885.

HABEAS CORPUS—PETITIONER REMANDED.

No error appearing in the proceedings which would justify a discharge of the prisoner on *habeas corpus*, the petitioner remanded.

Department 2. Application for discharge on *habeas corpus*.

J. Lambert, for petitioner.

BY THE COURT. The petitioner was convicted under section 4 of the act of March 30, 1878, (St. 1877-78, p. 813,) of a misdemeanor, in having unlawfully beaten a child, and causing said child to suffer unjustifiable physical pain, and was sentenced to pay a fine and be imprisoned. No error appears in the proceedings which would justify a discharge of the prisoner on *habeas corpus*.

The petitioner is remanded.

(67 Cal. 299)

SHELDON v. MULL. (No. 9,685.)

Filed August 18, 1885

EJECTMENT—POSSESSION TO CONSTITUTE OUSTER.

The possession of defendant, to sustain an action of ejectment, may be sufficient to constitute an ouster, though the land in controversy has not been inclosed so as to deprive the plaintiff of possession of the same.

Commissioners' decision.

Department 1. Appeal from superior court, Sacramento county.

Freeman & Bates, for appellant.

A. P. Catlin, for respondent.

SEARLS, C. Ejectment to recover a strip of land. The jury rendered the following verdict:

"We, the jury in the above-entitled cause, find for the defendant, on the ground that he has not had possession of any of the land sued for."

Plaintiff and defendant were adjoining owners of land. In December, 1881, defendant constructed a fence, apparently as and for a line fence between himself and plaintiff, but which was not on the line, being over on plaintiff's land, and leaving a narrow strip thereof on defendant's side. The fence did not make an inclosure, extending only a portion of the way along the vicinity of the line, and at the end of such fence there was an open space, by which egress and ingress could be had from and to plaintiff's land. At the trial, plaintiff asked the court to instruct the jury as follows:

"It is not necessary for the plaintiff to show that the defendant surrounded the land in controversy by an inclosure. The defendant is to be deemed to be in possession of such part of the land, if any, as he occupied and used, in the same manner that owners of land of like character in that neighborhood commonly occupy and use them."

The court refused to give the instruction, which refusal was excepted to, and is assigned as error. The court, at request of defendant, instructed the jury as follows:

"In order to entitle plaintiff to recover the strip of land claimed in this action, it must appear to the jury from the evidence that defendant so inclosed the same as to deprive plaintiff of the possession of the same, and to appropriate the same to his own exclusive use, and that the land so inclosed belongs to plaintiff."

The giving of which is also assigned as error. It will be perceived that, by the instruction refused and the one given, the court indicated to the jury very clearly that to constitute an ouster it was necessary that defendant should have inclosed the land in dispute so as to deprive plaintiff of the possession thereof; and in defendant's third instruction the court told the jury they must be satisfied from the evidence that by means of fences defendant so inclosed the strip of land as to deprive plaintiff of the possession of the same. Actual possession of land may be had without fences or inclosure. *McCreery v. Everding*, 44 Cal. 246. Inclosing land by a fence is evidence of possession, but it is not the *only* evidence of possession. He who

enters upon land, occupies it, subjects it to his will and dominion for a purpose to which it is adapted, excluding all other persons therefrom, and is in the exclusive enjoyment of its advantages and products, is as much in the possession of such land as though he had inclosed it with a fence. In *Sunol v. Hepburn*, 1 Cal. 254, the court held that the fact that cattle and horses of a person had roamed over and grazed upon a tract of land does not, of itself alone, make out an actual possession of the land in him. A person, however, who marks off the boundaries of a tract of land, reasonable in extent, and habitually uses the same for pasturage of stock, confining his cattle thereon and excluding all others therefrom by the aid of herdsmen employed by him for that purpose, the land being adapted to the purpose indicated, is as much in the actual possession of such land as though he had inclosed it by a fence. "The possession to be shown in the defendant, in an action of ejectment, need not be *actual*, as contradistinguished from *constructive*, in its character." *Crane v. Ghirardelli*, 45 Cal. 236.

In the present case there was evidence tending to show that defendant had built his fence over the line and upon the land of plaintiff. The defendant, who was a witness in his own behalf, on cross-examination said:

"Since December of last year I have used the land the same as before. Have run my sheep on it. I suppose the sheep run up to the new fence. I had the same use and occupation of the part up to the new fence as of any other part of my place, and I claimed the right to use up to that fence. I supposed the fence was on my land. I used the part adjoining the fence the same as I used all my high land."

This testimony tended to show that defendant was in possession of the land in dispute, claiming it as his own.

The instruction refused and those given, taken together, indicated to the jury that the evidence of possession in defendant was of no avail, and did not amount to an ouster, unless defendant had so inclosed the land as to deprive plaintiff of the possession of the same. This was error, for which the judgment should be reversed and a new trial granted.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for a new trial.

SUPREME COURT OF UTAH.

(4 Utah, 521)

FERRY v. STREET.¹

Filed August 4, 1885.

PUBLIC LAND—PATENT—IMPEACHMENT OF TITLE—COLLATERAL PROCEEDING.

If, under any assumed state of circumstances, a patent can be valid, then it cannot be attacked in any collateral proceeding, or in any manner, except by direct action to set aside the deed indicated, either by the United States, or by the persons who have succeeded to its rights.

P. Denny, for appellant, *John L. Street*.

Sutherland & McBride and *Arthur Brown*, for respondent, *Edward P. Ferry*.

EMERSON, J. The form of this action is one for the possession of real estate situated in the town of Park City. The plaintiff claims title under the patent of the United States, and by mesne conveyances to the plaintiff from the patentee. No question is made as to the existence of the patent, or the title deraigned therefrom in plaintiff; but in this action at law for the recovery of possession the defendant seeks to assail that patent on the following grounds: *First*, the premises in truth did describe a part of section 16, and that, therefore, they were not open to settlement, and the plaintiff and his grantor had no right to patent the same, for the reason that it was a school section, and the authorities were forbidden to patent the same to settlers; *second*, that the said lands were mineral lands, and therefore not open to claims of settlers; *third*, that the lands were occupied by people squatted thereon, and claiming to be a city, to-wit, Park City.

We will determine these three objections in their order: The plaintiff procures his title under the scrip known as "Valentine Scrip;" the authority for the issuing of which is to be found under the General Laws of the United States of 1881, page —, which authorizes the holders of such scrip to enter unappropriated lands of the United States, and the first question involves the inquiry as to what is the meaning of "appropriated" or "unappropriated." It is claimed by the appellant that lands which may possibly fall in section 16 or 36, although not then surveyed, are appropriated. On the other hand, it is contended that the only appropriation of the lands which fall within sections 36 and 16 is when they are surveyed, and found to be such sections by official survey; and until such survey the lands are open for any appropriator, and a person seeking to pre-empt or to homestead on such lands has always to be recognized as one entitled to enter thereon, and his right has to be protected, although afterwards the number of this section turned out to be 16 or 36. The Valentine scrip was not more limited. The holder of it had the right to enter upon any lands which had not been actually designated and set aside for the use of

¹See 7 Sup. Ct. Rep. 231.

schools, or for the use of actual appropriators. These pre-emptors or people were not holding under homestead claims. These lands had never been pre-empted or made subject to homestead claims, nor had they been surveyed at the time when this patent was applied for. If under any assumed state of circumstances a patent can be valid, then it cannot be attacked in any collateral proceeding or in any manner except by direct action to set aside the deed indicated either by the United States or the persons who have succeeded to its right. It is apparent that this patent not only could have been, but under the existing circumstances was, valid. It was not in the power of the defendant or appellant to attack that patent in a court of law on the ground that it included school lands. The law upon this subject is fully stated in the case of *Steel v. Smelting Co.* 106 U. S. 454; S. C. 1 Sup. Ct. Rep. 389: "So, with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity, if he possesses such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation. It cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves. Their power over the land is ended when the patent is issued and placed on the records of the department." The other cases cited on both sides are in conformity with this ruling.

The determination of this first question decides the other also. If these premises were mineral lands, as claimed by the appellant, and the appellant had any right therein, it was his duty to have applied for a patent and asserted his right before the department. An adjudication of the department of the land-office upon the subject is conclusive and final. It would be a strange doctrine, if, after the United States government has patented land away, and minerals should be discovered in the lands, within his patent or deed, that some outside discoverer could say the patent was void. Such was not the intention of the law. If it had been true that any mineral entries had been made at the land-office at the time this patent was applied for, then such owners, and the defendant among them, if he were one, must have had notice of the procedure; and the law assumes and presumes he did have notice. If, after inquiry, the land-office determined the plaintiff had, or his grantors had, a right to a patent, that decision was binding upon the court. The same result must follow if no inquiry was entered into. The land-office had jurisdiction in the matter; its determination was final.

Precisely the same views control the third point. The defendant offers to prove that there were, at the time of the application of this

Valentine scrip to the premises in question, a few hundred squatters within the land conveyed. Those squatters had taken no measures or steps to procure title under the town-site law,—filed no papers in any tribunal entitling them to act as such. If it was desired and within the law to plat a town-site entry, they had ample opportunity. Until they did so they were mere trespassers, and the lands were unappropriated, and it was open for the government to eject them. *Yosemite Valley Case*, 15 Wall. 77. Until such act on the part of squatters, any person having the authority of the United States government could deed the same. The grantor of the plaintiff, holding the Valentine scrip, had the authority of the United States government. These lands at the time had been unappropriated, in every sense of the term. They had not been even surveyed; and, until they were surveyed, no appropriation whatsoever had been made of them. The court concurs in the findings, and the opinion of the court below.

(The other judges concur.)

(4 Utah, 192)

DARKE v. IRELAND.

Filed August 8, 1885.

PRACTICE—MOTION TO SET ASIDE VERDICT, SEVERAL TERMS OF COURT HAVING PASSED.

The court has no power or authority to set aside a verdict after several terms of court have elapsed since such verdict was given.

Hoge & Burmester, for plaintiff.

Marshall & Royle, for defendant.

ZANE, C. J. This is an appeal from an order of the court below overruling a motion to set aside a judgment on the verdict. The plaintiff filed his complaint, duly verified, claiming the personal property described, and alleging its value to be \$2,500. The defendant answered, admitting the right and title of one billiard table to be in plaintiff, and denied that defendant had taken or detained it, and denied the allegation of right in plaintiff to the other property, but did not deny the allegation of value. Defendant also justified taking the goods, except the billiard table mentioned, as United States marshal, under a writ of attachment against Robert Burns, in favor of Livingston & Co.; alleged property in the former, indebtedness from him to the latter, and that plaintiff took the goods under legal process while defendant was so holding them. Section 1290, Comp. Laws Utah, provides that every material allegation of the complaint, when it is verified, not specially controverted by the answer, shall, for the purpose of the action, be taken as true, and allegation of new matter in the answer shall, on the trial, be deemed controverted by the adverse party. Under this statute the pleadings presented an issue on plaintiff's right, on property in Burns, on the justification under the attachment, and on the taking of the goods afterwards by the plaintiff. These issues were submitted to a jury, who, on the twenty-fifth day

of May, 1883, returned the following verdict: "We, the jury, find for the defendant on the issues in the above-entitled cause." And the court on the same day adjudged that defendant recover of the plaintiff the possession of the property described in the complaint, except the billiard table, admitted in the answer to belong to plaintiff, or \$2,500 in case delivery could not be had. On June 21, 1884, the plaintiff filed a notice of motion to set aside the judgment: (1) Because it was not supported by the pleadings; (2) because it was not supported by the verdict.

We find no error in the pleadings. The property described in the complaint, alleged to be of the value of \$2,500, included a billiard table conceded to plaintiff. The value of this table is not averred, and does not appear; but, assuming it to be worth something, the value of the property found for the plaintiff was less than \$2,500. It was error to enter up judgment for the full amount alleged in the complaint (including the value of plaintiff's table) in case a delivery of the property could not be had. This error, however, did not render the judgment void. The court having obtained jurisdiction over the person and over the subject-matter, error in the exercise of that jurisdiction did not make the judgment void. *Freem. Judgm.* § 135. More than a year intervened between the twenty-fifth day of May, 1883, the date of this judgment, and the twenty-first day of June, 1884, when the notice of the motion to set it aside was filed, and several terms of the district court in which it was rendered had intervened. After an adjournment of a term of court at which a judgment is rendered, the court loses all power to set it aside on motion made at a subsequent term, in the absence of a statute authorizing it to be done. 1 *Estee, Pl. & Pr.* (2d Ed.) 33; *Carpenter v. Hart*, 5 Cal. 407; *De Castro v. Richardson*, 25 Cal. 52.

It appears from the record that on June 20, 1883, 26 days after the date of the judgment, and during the term at which it was rendered, the plaintiff filed an affidavit in which he stated certain reasons for a new trial, and on the twenty-seventh day of the same month this affidavit appears to have been served on defendant. This is all that appears on the record with respect to the motion. The plaintiff urges that the effect of these steps towards a motion for a new trial was to retain jurisdiction in the court over the case for the purpose of the motion to vacate the judgment. No such notice of motion as is required by section 1420, *Comp. Laws Utah 1876*, was given. The failure to comply with the laws with respect to the motion, with the further fact that no notice appears to have been taken of it by the court or counsel, authorizes the inference that the motion for a new trial was abandoned.

The order of the court below appealed from is affirmed.

POWERS, J., concurs.

(4 Utah, 185)

BOWRING v. BOWRING.

Filed August 2, 1885.

ATTACHMENT—MOTION TO DISSOLVE—APPEAL FROM ORDER—ESSENTIALS OF THE RECORD—BILL OF EXCEPTIONS.

On appeal from an order granting or refusing a motion to dissolve an attachment there is in Utah no statute making the motion itself or the affidavits a part of the record without a bill of exceptions. But if it were conceded that a bill of exceptions was unnecessary to bring such affidavits before the supreme court of the territory, all the evidence heard upon the motion to discharge should be found in the record, and, if consisting of affidavits, they should also be specified in the certificate of the clerk and identified.

Darke & Kenner, for appellant.

Arthur Brown, for respondent.

ZANE, C. J. The plaintiff in this case filed his complaint in the office of the clerk of the Third district court, and the defendant his answer. The plaintiff also filed an affidavit, in which he alleged that defendant was disposing of his property with intent to defraud his creditors; and an attachment writ issued, by virtue of which defendant's property was seized. The defendant entered a motion to discharge the attachment, for the reason that the charge of fraud was untrue, and presented affidavits in its support; and the plaintiff presented counter-affidavits. The motion was overruled by the court, and defendant excepted, and appealed from the order. The issue determined by the court was one of fact, and the evidence consisted of affidavits. In order to determine this issue, we must have the evidence before us. Some of the affidavits used on the hearing of the motion in the court below were copied into the transcript, others were not, and those copied were not identified in the clerk's certificate as the ones used, nor are they found in the bill of exceptions. Except in cases in which default is entered, the judgment roll consists of the pleadings, a copy of the verdict of the jury or finding of the court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer or relating to a change of parties, and a copy of the judgment. The affidavits were not a part of the judgment roll. Section 551, p. 251, Laws Utah 1884. Section 538, p. 249, Laws Utah, provides that—

"The judgment roll, and the affidavits, or bill of exceptions, or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the court; and in that case the judgment roll, and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal."

This section applies to records on appeal from judgments granting or overruling motions for new trials. On appeal from an order granting or refusing a motion to dissolve an attachment, there is no statute making the motion itself or the affidavits a part of the record without a bill of exceptions. But if it were conceded that a bill of exceptions was unnecessary to bring such affidavits before this court,

we hold that all the evidence heard upon the motion to discharge should be found in the record, and, if consisting of affidavits, they should also be specified in the certificate of the clerk and identified. In the case of *Paine v. Linhill*, 10 Cal. 371, the court said:

"The practice act, after designating the manner in which statements shall be prepared, expressly excepts appeals from an order made upon affidavits filed, and provides that the affidavits shall be annexed to the order in place of the statement. Sections 337, 343. All that is required; then, in such a case, is that the certificate of the clerk should specify the affidavits used, and to enable him to do so he should at the time mark them as filed on the motion."

The statute of California referred to applies to all orders made upon affidavits filed. In that it differs from the statute of Utah. If we concede, however, that section 538 of the statute of Utah, above quoted, applies to all orders made upon affidavits filed, still we cannot reverse the judgment of the court below—*First*, because all the affidavits used on the hearing of the motion are not found in the transcript; *second*, those copied into the transcript are not specified in the certificate of the clerk. They are not marked as filed on the motion or identified in any way. Such a practice would result in uncertainty, and in reversals on imperfect or partial records. We are of the opinion that the order appealed from cannot be disturbed on this record. It is therefore affirmed.

EMERSON and TWISS, JJ., concurred.

SUPREME COURT OF ARIZONA.

(2 Ariz. 10)

ARIZONA PRINCE COPPER CO. v. COPPER QUEEN MIN. CO.

Filed —, 1885.

1. PRACTICE—JUDGMENT—VERDICT—SUBSTANTIAL CONFLICT OF EVIDENCE—APPELLATE COURT.

A judgment based upon a verdict where there is a substantial conflict in the evidence should not be disturbed by the appellate court.

2. SAME — MISCONDUCT OF JURY — INTOXICATION — CONTRIBUTION TO SAME BY PARTY COMPLAINING.

Where the plaintiff and defendant combine to feast the jury, neither can be heard to complain of the act and performance which they jointly inaugurated without proof of intoxication to the extent of disqualifying the jury, or some member thereof, for a proper discharge of duty.

Appeal from First judicial district court, Cochise county.

Lewis & Dibble and *W. H. Stilwell*, for appellant, Copper Queen Mining Co.

George R. Williams, for respondent, Arizona Prince Copper Co.

HOWARD, C. J. Action of ejectment for the recovery of mining ground. Judgment in the district court of Cochise county for plaintiff. Motion by defendant for a new trial denied, from which judgment and order denying motion defendant appeals to this court. By stipulation, appearing in the record, the questions of location, corporate existence, and claims for damages for value of ore extracted, made by plaintiff's complaint, and the cross-complaint of defendant, are eliminated from the case, leaving for review, on appeal, the legal right of the parties to the body of ore involved in the issue, and the question presented by the appellant's specification of errors—alleged misconduct of the jury.

Plaintiff, the Arizona Prince Copper Company, and defendant, the Copper Queen Mining Company, own adjoining claims, with a common side line of between 500 and 560 feet. By the allegations of the complaint, and the evidence of plaintiff, the claim is asserted and sought to be established that the apex or outcrop of the vein is on the ground of plaintiff, and that it has the right to follow it beyond and under the side line into the adjoining ground of defendant. The defendant by cross-complaint admits a portion of the outcropping to be on plaintiff's ground, and alleges, and gives evidence tending to establish the fact alleged, that part of the outcropping is on its ground: that the vein at the surface divides, and that one division extends into defendant's ground, the other running into plaintiff's ground. Plaintiff admits that a streak of the ore-bearing rock comes to the surface of defendant's ground, but contends that it is outside of the walls of the vein, and is but a spur of the main vein which outcrops on plaintiff's ground. The plaintiff claims that both walls of the vein are on

its ground, and defendant practically concedes that the foot wall is on plaintiff's ground, but denies that the hanging wall is.

The issue made by the pleadings as to the character of the body of ore,—whether a lead, load, or vein,—and other questions of fact, notably the particular location of the apex of the vein with reference to the boundaries of the respective claims, the dip and course of the vein, etc., as well as the question in controversy above referred to, were all questions of fact no more positively asserted and insisted upon on the one side than denied and controverted by the other, not only by the pleadings, but by the evidence in the case. There is not a material fact involved in the issue joined between the parties which was not on the trial controverted, and that by evidence not only conflicting in its character, but in our opinion bringing the case clearly within the rule of "substantial conflict" in the evidence. The immense volume constituting the record in this case contains over 600 pages of evidence, and we have examined it with a view to ascertain if there was one material fact in controversy in the issue upon which there was not sufficient evidence on either side to clearly warrant the application of the rule of non-interference of the appellate court where there is a substantial conflict in the evidence. If we were to accept the rule insisted upon by appellant, that "if the great preponderance of evidence is against the findings or verdict the court should reverse it," (which we do not accept as a correct rule of action for the appellate court,) we fail to find in the mass of testimony *pro* and *con*, on each of the contested propositions involved in this case, that "great preponderance" which would bring our action within such a rule. Even that rule would not warrant our interference with this judgment. The issues were plainly and squarely presented by the pleadings at the trial, and the too-frequent conflict of "expert testimony" is more apparent than the conflicting testimony of non-professionals on the material facts involved. The case is clearly within the well-established rule that a judgment based upon a verdict where there is a substantial conflict in the evidence should not be disturbed by the appellate court. *Union Pac. Ry. Co. v. Diehl*, 6 PAC. REP. 566, (Sup. Ct. Kan.); *Pringle v. Spaulding*, 53 Barb. 21; *State v. Yellow Jacket S. M. Co.* 5 Nev. 415; *Kimball v. Gearhart*, 12 Cal. 48; *Farrell v. Enright*, Id. 452; *Richardson v. McNulty*, 24 Cal. 348; *Iburg v. Suanet*, 47 Cal. 267; *McMurray v. Basnett*, 18 Fla. 609; *Gower v. Quinlan*, 40 Mich. 572; *Elliott v. Van Buren*, 33 Mich. 49.

The alleged misconduct of the jury appears by the record to have been carefully and thoroughly investigated by the court below on the motion for a new trial. We concur in the conclusions arrived at by that court. While it is true that the jury "were feasted and wined" at the dinner ordered by the sheriff, by the agreement of both plaintiff and defendant, (a proceeding which the officer in charge of the jury ought not to have permitted, even by consent of both parties,) we are yet unable, after reading the many affidavits bearing upon the question

of the alleged intoxication of members of the jury, to come to the conclusion that any of them indulged in liquors to the extent of intoxication, or that, by reason of the eating and drinking by the jury at the joint expense of the parties, the jury, or any member thereof, was unfitted for the intelligent, fair, and impartial performance of duty. That intoxication would disqualify a juror from the performance of his duty, and amount to misconduct, there can be no question; and while it is true that there is some evidence from which the fact of the use of liquor by the jury other than that drunk at the supper table may be legitimately inferred, much of the showing to impeach the verdict was speculative, and of a character not commending itself to our confidence. We cannot find from the evidence that any juror was intoxicated, or under the influence of liquor. The plaintiff and defendant prepared the feast and inaugurated the festivities. Neither can be heard to complain of the act and performance which they jointly inaugurated, without proof of intoxication to the extent of disqualifying the jury, or some members thereof, for a proper discharge of duty. The rule is well established that courts will not disturb a verdict when satisfied that intoxicating liquors had no influence upon the jury, and we are satisfied on that point in this case. *Jones v. People*, 6 Colo. 452; *State v. Jones*, 7 Nev. 408; *Richardson v. Jones*, 1 Nev. 406; *Kee v. State*, 28 Ark. 165; *State v. West*, 33 Amer. Rep. 506; *State v. Sparrow*, 3 Murph. 487; *Pittsburg, C. & St. L. Ry. Co. v. Porter*, 32 Ohio St. 333; *People v. Lyle*, 4 Pac. Rep. 977, (Sup. Ct. Cal.); *May v. People*, 6 Pac. Rep. 816, (Sup. Ct. Colo.)

The charge of the court, including the instructions asked and given, taken as a whole, gave the law fairly and correctly to the jury. We find no valid ground for a reversal. The judgment and order of the court below denying the motion for a new trial are affirmed.

FITZGERALD, J., concurring

PINNEY, J., having tried this case in the court below, took no part in the decision.

SUPREME COURT OF CALIFORNIA.

(67 Cal. 302)

HAGGIN v. RAYMOND and others. (No. 9,543.)

Filed August 18, 1885.

EJECTMENT—CROSS-COMPLAINT—SPECIFIC PERFORMANCE—VERDICT IN EQUITY CASES.

A cross-complaint, in an action of ejectment, constitutes a case in equity. Where it sets up a parol contract for a lease, and prays a specific performance on the issue raised by such cross-complaint, the verdict is merely advisory, and may be disregarded by the court.

Commissioners' decision.

Department 1. Appeal from superior court, Sacramento county. *J. H. McKune, A. P. Catlin, and E. Brunner*, for appellants.

H. O. & W. H. Beatty, for respondent.

BELCHER, C. C. This is an action of ejectment. The defendants answered, admitting the plaintiff's ownership of the demanded premises, and setting up, by way of cross-complaint, that they entered upon the premises and made valuable improvements thereon under a parol contract that the plaintiff would give them a written lease of the premises for a number of years, and they prayed for a decree compelling a specific performance of the contract. When the case came on for trial the court ruled that the issues made by the cross-complaint, and the answer thereto, must be first tried, and, at request of defendants, impaneled a jury to find upon those issues. At the close of defendants' testimony the court, on motion of plaintiff, granted a nonsuit as to the cross-complaint. The defendants then waived a jury trial of the issues arising upon the plaintiff's complaint, and their answer thereto, and the case was tried by the court. Judgment was rendered in favor of the plaintiff, and from that judgment, and an order denying a new trial, this appeal is taken. There was no error in granting the nonsuit. The facts stated, and the relief asked in the cross-complaint, constituted a case in equity, and it is well settled that in such a case the verdict of a jury is merely advisory, and may be disregarded by the court. *Bates v. Gage*, 49 Cal. 126; *Johnson v. Powers*, 3 PAC. REP. 625; *Sweetser v. Dobbins*, 3 PAC. REP. 116.

The court found, upon all the issues raised by the complaint, the cross-complaint, and the answers thereto, against the defendants. It is now insisted that these findings were not justified by the evidence, and that the judgment should therefore be reversed. We have carefully read over all the testimony found in the transcript, and are unable to agree with the views of the appellants. It would subserve no useful purpose to state the testimony at length, but we think it clearly appears that Mackay, plaintiff's agent, never pretended to have any authority to make leases, even for a year, and that plaintiff never

held him out as an agent for that purpose. It does not clearly appear that Mackay ever made the agreement set up in the cross-complaint, and, if it did, there is nothing to show that the plaintiff knew of, or in any way ratified, the unauthorized act. The defendants had a lease for the year 1882, and they paid the rents, but the fact that the plaintiff received those rents could not have the effect to ratify the alleged agreement for a lease for three years with a privilege of two years more.

The judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(67 Cal. 317)

Cox v. Woods. (No. 9,669.)

Filed August 19, 1885.

MISTAKE, REFORMATION OF CONTRACT FOR—EVIDENCE.

Court of equity will not reform written instruments on the ground of mistake unless the evidence of such mistake is clear and free from reasonable doubt.

Commissioners' decision.

Department 1. Appeal from superior court, Sacramento county.

D. E. Alexander, for appellant.

J. C. Tubbs, for respondent.

BELCHER, C. C. Before a written instrument can be reformed, on the ground that there was a mistake in draughting it, the evidence that there was a mistake should be clear, satisfactory, and free from reasonable doubt. *Wachendorf v. Lancaster*, 61 Iowa, 509; S. C. 14 N. W. Rep. 316. The power of courts of equity to reform written instruments is one in the exercise of which great caution should be observed. To justify the court in changing the language of the instrument sought to be reformed, in the absence of fraud, it must be established that both parties agreed to something different from what is expressed in the writing, and the proof upon this point should be so clear and convincing as to leave no room for doubt. *Mead v. Westchester Fire Ins. Co.* 64 N. Y. 455. See, also, *Gillespie v. Moon*, 2 Johns. Ch. 585; *Hearne v. Marine Ins. Co.* 20 Wall. 490.

In this case the proof was not clear and satisfactory to the court below that any mistake was made in drawing the note sued on. As written, it bore "interest at one per centum per annum," and it was claimed that the word "annum" was written by mistake in place of the word "month." The only witness called to prove the mistake was Nichols, who wrote the note. In his examination in chief he said: "The way I understood it, the understanding was one per cent.—12 per cent. per annum; that is what I paid Cox—what I took it

for. I did not notice that the word 'annum' was in the note." In his cross-examination he first said: "The rate of interest was 12 per cent.—one per cent. per month." But when asked if he read the note to Mr. Hobbs and Mr. Cox after he had drawn it up, he said: "Yes; I called Mr. Cox's attention particularly to the word 'annum' in the note, and the agreement between him and Hobbs was one per cent." This was all the testimony introduced upon the subject, and it certainly did not make the plaintiff's case so clear and convincing as to leave no room for doubt. The last question to the witness was objected to by the plaintiff as irrelevant and immaterial, but we think there was no error in overruling the objection.

The judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(67 Cal. 315)

CONNOR v. STANLEY. (No. 9,784.)

Filed August 19, 1885.

MARRIAGE CONTRACT—ENFORCEMENT—UNDUE INFLUENCE—EVIDENCE.

In an action to enforce a marriage contract, where the defense is set up that defendant's intestate had been unduly influenced to make the contract by plaintiff by means of spirit mediums, evidence is not admissible as to whether, in the opinion of a witness, the defendant's intestate was liable to be unduly influenced by such spirit mediums.

Commissioners' decision.

Department 1. Appeal from superior court, Sacramento county.

W. H. Beatty and R. T. Devlin, for appellant.

Freeman, Bates & Johnson, for respondent.

FOOTE, C. This action was tried by a jury, and the evidence before them warranted their verdict. The instructions given by the court fully and fairly stated the law of the case, and there is no objection urged on this score by the counsel for the appellant in their brief. The evidence, except as hereinafter stated, was properly submitted to the jury. But the trial court, against the plaintiff's objection, allowed the following questions to be propounded to the witness Van Den Mark, and to be answered by him:

"*Question.* State whether Mr. Jarvis was competent to make a contract with a person that he believed to be a medium of communication between spirits of dead people and living persons? What I mean is, do you think that he was competent to make contracts with those people that came to him and claimed to be mediums; whether or not they would have an undue influence over him?"

"*Answer.* I think that they would make a contract; in making that contract they would have all the influence over him, and that he would do it under their supervision."

And to the witness Peter Yager the following question was allowed to be put and answered, against the objection of the plaintiff:

"*Question.* Would a person professing to be a medium have more or less control over him than a person not professing to be a medium?"

"*Answer.* Well, a person that believed in his doctrine could do almost anything with him, and a person that did not believe in spiritualism he would not have anything to do with."

The action was brought against the administrator of the decedent, William Jarvis, to enforce an alleged marriage contract, by causing to be delivered to the plaintiff certain bonds, or their value to be paid her. The issue which was raised by the pleadings, and presented to the jury to be by them determined, was whether or not the decedent had in his life-time been in such a state of mind as to have been unduly influenced by the plaintiff to make the contract, who, the evidence disclosed, claimed to be, and was believed by Jarvis to be, a medium of communication between spirits of dead people and living persons. Those questions propounded to the witnesses above mentioned, and which were answered by them, involved the precise question which was presented by an issue to be tried by the jury, and by that means the province of that body was invaded. *Walker v. Walker's Ex'r*, 34 Ala. 469, 473; *People v. Westlake*, 62 Cal. 305, 309. Hence, for the reasons stated, we are of opinion that the judgment and order denying a new trial should be reversed, and a new trial granted.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

(67 Cal. 353)

In re TREADWELL. (No. 9,761.)

Filed August 22, 1885.

ATTORNEY AT LAW -DISBARMENT—PREVIOUS CONVICTION OF CRIME UNNECESSARY.

The supreme court may disbar an attorney for misconduct in fraudulently appropriating his client's money, collected by him; and in the exercise of such power the court simply determines whether the attorney is a fit person to be allowed to continue in the practice of the law under the license granted him therefor, and not whether he is guilty of the commission of a crime; the latter being a matter for a criminal court of competent jurisdiction, under due process of law. It is not necessary to a proceeding to disbar an attorney that he be previously convicted of a crime.

In bank. Proceedings for disbarment of an attorney.

G. E. Harpham, for petitioner.

A. C. Adams and W. C. Belcher, for respondent.

McKEE, J. This is an original proceeding to disbar an attorney at law for misconduct in office, in fraudulently appropriating to his own use moneys collected by him for his client. The record shows

that Carl Haneke had employed the attorney in a transaction which involved the sale and transfer of a tract of land in Yolo county to one Isaac Quinn. Quinn gave his promissory note for the purchase money of the land, payable in the sum of \$2,450, and interest thereon from date of the note, payable quarterly in advance, to Haneke, at the Bank of California, and secured its payment by a mortgage trust deed upon the land. Note and deed were executed and delivered to Haneke on the twenty-sixth of March, 1881. Possession of the deed Haneke retained, and the note he deposited in the Bank of California for collection. After finishing the transaction in that way, Haneke settled with the attorney and paid him for his legal services; but, under the authority of Haneke, the attorney continued to act in collecting the quarterly interest as it became due upon the note, and any payments that were made of the principal sum. Between the date of the note and the month of December, 1883, each quarterly interest of the note as it became due and \$400 of the principal were collected and transmitted by the attorney to the bank, and were there properly applied to the payment of the note, and carried to the account of Haneke, who received and receipted for them. But in December, 1883, the attorney collected in full, of the principal and interest then due, \$2,102.61, for which he gave his receipt in the following words:

"\$2,102.61.

WOODLAND, CAL., December 12, 1883.

"Received of Isaac Quinn, twenty-one hundred and two 61-100 dollars, to be applied in payment of his note of March 26, 1881, to Carl Haneke.

"W. B. TREADWELL."

This money he did not transmit to the bank as he had done his prior collections. Upon receiving the money he deposited it in his own name in the Bank of Yolo, and used it at as his own. Under oath he admits that within a few days after he had deposited the money he drew \$400 of it, and used it for his own purposes; that within a week or 10 days he obtained from the bank a certificate of deposit for \$1,500 of it, payable to himself or order, on return of the certificate properly indorsed; and that the balance he kept and used. It is claimed for him that he appropriated the money in that way by the authority and under instructions from a daughter of his client, at whose request he agreed to hold the money until an opportunity could be found for its investment in some way so that it would yield, in the way of interest, a small monthly or quarterly income for the support of her father, and that, when the daughter found an investment, she wrote for the money, and he sent her the \$1,500 certificate of deposit, properly indorsed by himself, and at the same time borrowed from her the balance of the money at the same rate of interest that Quinn had paid on his note. This defense rests altogether upon his own testimony. His testimony, given in his own behalf, tended to show that in March, 1883, he received from the daughter of his client a letter in the following words:

"SAN FRANCISCO, March 27, 1883.

"*Mr. W. B. Treadwell*—DEAR SIR: During my father's recent dangerous illness he deemed it advisable to arrange business matters to his satisfaction. He therefore indorsed and assigned the promissory note of the trust deed to me, and consequently I shall sign all receipts for interest or money sent as payment on note hereafter. The trustees have been duly notified of the change. Will you have the kindness to inform Mr. Quinn of the fact, and request him, when he forwards interest again, to have the check at the bank payable to me? Father is much better, but, being over 80 years of age, he does not feel able to have the cares of business thrust upon him. Hoping these few lines may find your family in good health, I remain

"Yours, truly,

HARRIET A. WISE,

"516 Filbert street."

He did not inform Mr. Quinn of the request contained in the letter, but he continued to make collections from him upon the note as usual. It is true, however, that the note was withdrawn from the bank by Haneke during his sickness, and, after indorsement by him, was again returned, after which Mrs. Wise drew from and receipted to the bank for all moneys which were collected and transmitted by the attorney for payment upon the note prior to the month of December. In connection with these facts the substance of the attorney's testimony, condensed to brevity, is this:

"Before or about the time I collected the principal and interest due on the note, I happened to meet Mrs. Wise at the Palace Hotel, in San Francisco, and there informed her that Quinn was, or would be soon, ready to take up his note. This troubled her, because, as she expressed it, her father was old, very feeble, and childish, and looked to the regular payment of the interest on the note as absolutely necessary to his comfort in his declining years, and she thought it advisable that knowledge of the payment of the note should be kept from him; therefore she 'proposed' to me that, instead of transmitting the money to the bank, as usual, to be applied to the payment of the note, I should retain it in my possession until she or I could find some opportunity to invest it so as to make it interest-bearing; and, in the mean time, I could use the money to pay interest at the bank as usual, so as to have it appear that the matter was going all right."

After this alleged interview the attorney admits he never saw Mrs. Wise again. And the fact is that, before it became publicly known that the money had been collected, Mrs. Wise fell sick and was taken to the German hospital, where she died. But the attorney claims that before her death, and soon after he had deposited the money in the Bank of Yolo, he began a correspondence with her as to the investment of the money, in one of the letters of which he sent to her address in San Francisco, by mail, the certificate of deposit for \$1,500, by him properly indorsed, and at the same time wrote to her as follows:

"As to the balance of the money, I will, if satisfactory, use it myself, and pay you the same rate of interest until you can use it otherwise, or I can find some other investment." In answer to that letter she wrote to me acknowledging the receipt of the certificate, and at the same time asked me to send her \$200 of the balance in my hands, if I could conveniently spare it, urging me at the same time to keep the matter open, and pay the next installment of in-

terest at the bank. To that letter I replied that it was not convenient to send the \$200, but I would let her know, in a day or two, whether I could do so; and that I would attend to the payment of interest. *Question.* "You made an investment of the rest for her." *Answer.* "Yes, sir." *Q.* "Of \$600?" *A.* "Yes, sir. * * * I had borrowed it myself, and had so stated in my letter; and she had agreed to it—it was agreed to by her. I was to pay the same rate of interest that Mr. Quinn had been paying, until I should give it up or make some other investment."

All the letters of this asserted correspondence, says the attorney, are lost, and he testified to their contents from his recollection. There was, of course, no explanation or contradiction of his statements by Mrs. Wise, she being dead. Upon his own testimony, therefore, as to the authority from and correspondence with Mrs. Wise rests his exculpation of himself, and we regret to find that his attempted exculpation is not founded in fact. As fact, the attorney admits the use of the money for his own purposes, except the sum of \$1,500, which he claims to have sent to Mrs. Wise. But it is a fact that Mrs. Wise never received the certificate of deposit, nor had it cashed by any one for her. On the contrary, the evidence proves, beyond a reasonable doubt, that on the day after the attorney obtained the certificate from the Bank of Yolo he was in San Francisco, and on the next day, between the hours of 12 m. and 1 p. m., he in person presented the certificate to the Bank of California, properly indorsed by him, and received for it a cash payment, and a certificate of deposit for \$1,200, payable to himself, upon his indorsement, on which he soon afterwards received the money from the Bank of Woodland and used it. It follows that Mrs. Wise never received from the attorney any of the \$2,102 collected by him. In fact, the non-receipt of any portion of the money increased her sorrows and served to embitter her last days. The attorney, therefore, held back the entire sum which he collected, and used it for his own purposes, under circumstances which make his conduct inexcusable and unprofessional. The attorney admitted "that it was wrong to use the money, but he supposed that he could replace it whenever they wanted it, knowing that they wanted it kept out at interest." His good intentions, however, neither excuse nor mitigate his official conduct. As a lawyer, he knew that he could not professionally enter into a secret arrangement to conceal from his client a knowledge of the collection of the money, and that even under the color of such an arrangement, assuming that such had been made, it was not allowable for him to deal with the money in such a way as to injuriously involve the rights of others standing in such a relation to it as to be affected by an unauthorized and unlawful use of it, nor to convert it to his own use. He knew that it was a duty which he owed to himself, his client, and the man from whom he had collected the money, to pay it over as soon as he received it, by transmitting it to the bank where the note was deposited, and where it would be properly applied to the credit of the note, and turned over to the account of the owner.

In failing to discharge that duty, and in converting the money to his own use, he violated his oath of office and abused his trust.

As to the power of the court to strike the name of an attorney from the roll of attorneys and counselors of the court for such official misconduct, there is no question. Section 287, Code Civil Proc., provides:

"An attorney and counselor may be removed or suspended by the supreme court * * * for either of the following causes, arising after his admission to practice: (1) His conviction of a felony or misdemeanor, involving moral turpitude, in which case the record of conviction is conclusive evidence. (2) * * * Any violation of the oath taken by him, or of his duties as such attorney and counselor."

In the exercise of this power the court deals with the attorney only as an officer of the court in investigating charges against him for the purpose of determining whether, under the proofs, he is a fit person to be allowed to continue to practice as an attorney and counselor in the courts under the license which has been granted to him, and not for the purpose of adjudging whether he is guilty of the commission of a crime for which he ought to be convicted and punished. That can only be done in a criminal court of competent jurisdiction by due process of criminal law. Previous conviction of a crime is not necessary to a proceeding to disbar an attorney. If an attorney be found by a court guilty of acts indicating professional moral depravity, the court can, without previous conviction of a criminal offense, prevent the repetition of such official acts by taking away the license under which they have been committed. This it will do, not only in the interest of justice and of the public, but of the legal profession, which, like the court itself, ought to be free from all suspicion. "It is indispensable that an attorney be trustworthy. And he is not trustworthy if he is capable of improperly applying to his own use his client's money, whether he intends to return it or not." *Delano's Case*, 58 N. H. 5.

It is ordered that the name of the attorney be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney and counselor in any of the courts of the state.

We concur: ROSS, J.; MYRICK, J.; MORRISON, C. J.; THORNTON, J.; MCKINSTRY, J.

(67 Cal. 359)

Ex parte LICHENSTEIN. (No. 20,030.)

Filed August 22, 1885.

PAWNBROKERS' ACT LIMITING RATE OF INTEREST—CONSTITUTIONALITY.

The statute of California prohibiting pawnbrokers from charging a larger rate of interest than 2 per cent. per month on loans is constitutional, and not a special law in conflict with the constitutional provision which prohibits the passage of any local or special law regulating the rate of interest on money.

In bank. Application for discharge on *habeas corpus*.
Charles B. Darwin, for petitioner.

J. D. Sullivan and Danl. T. Sullivan, for respondent.

MORRISON, C. J. The petition for a writ of *habeas corpus* in this case sets forth "that a complaint was filed against the petitioner in the police court of the city and county of San Francisco, charging that he was engaged in, and was conducting, the business of a pawnbroker in said city, and as such received from a person therein named one gold watch as a pledge in consideration of a loan of \$30, and did then and there unlawfully and willfully charge on said loan a rate of interest in excess of 2 per cent. per month, to-wit, interest at the rate of 4 per cent. per month, and thereupon the petitioner was brought before said police court, was tried and convicted, and sentenced on said charge. Defendant thereupon appealed from said judgment of conviction to the superior court of the city and county of San Francisco, where said judgment was duly affirmed." It is claimed that the petitioner is unlawfully restrained of his liberty, because the act under which he was prosecuted is unconstitutional and void. The following is the law, for a violation of which petitioner was convicted:

"Section 340 of the Penal Code is hereby amended so as to read as follows: 'Every pawnbroker who charges or receives interest at the rate of more than 2 per cent. per month, or who, by charging commissions, discount, storage, or other charge, or by compounding, increases, or attempts to increase, such interest, is guilty of a misdemeanor.' "

Section 340 of the Penal Code, which was passed before and was in force when the new constitution went into effect, prohibited pawnbrokers from receiving a greater rate of interest on loans than 4 per cent. per month. The contention is that the last act on this subject, and the one under which the prosecution in this case was had, and which was approved March 7, 1881, is in violation of certain provisions of article 4, § 25, Const. The following are the provisions said to be violated:

"The legislature shall not pass local or special laws in any of the following enumerated cases; that is to say: (2) For the punishment of crimes or misdemeanors. * * * (23) Regulating the rate of interest on money."

This case really turns upon the second prohibition above referred to, because, if the legislature had the right to prohibit pawnbrokers from charging a larger rate of interest than 2 per cent. per month on loans made by them, it had a right to punish parties who violated the law, otherwise it would be a law without a sanction to enforce it. By section 2 of article 1 of the old constitution it was provided that "all laws of a general nature shall have a uniform operation;" and by the act of 1861, referred to above, the rate of interest which the pawnbrokers were allowed to charge was regulated by a law applicable solely to that class of money-lenders. In the case of *Jackson v. Shawl*, 29 Cal. 267, the constitutionality of that law was attacked on the ground that it was a special law, not uniform in its operation; but the court upheld it. The court there says:

"The constitutional objection which is made to this act of the legislature has been settled adversely to the views of the defendant by several cases, [naming them,] and it is only necessary for us to say we are satisfied with the general doctrine of these cases respecting the clause of the constitution in question, and therefore hold the objection made to the statute to be invalid."

In the case of *Ex parte Koser*, 60 Cal. 177, involving the constitutionality of the so-called Sunday law, one objection made to the law was that it was in violation of section 25, art. 2, of the present constitution, inasmuch as it was a special law for the punishment of crimes and misdemeanors, which the legislature was prohibited from passing. The law was sustained, and Mr. Justice THORNTON, in delivering the main opinion of the court, says:

"Certainly the legislature is intrusted with an enlarged discretion to determine what shall be punished criminally, and what shall not be; to fix upon what shall be put in the class of *mala prohibita*, and what shall not be included. It is consistent with this view to conclude and hold that such a law is a general one, uniform in its operation, and by it no privilege or immunity is granted, so as to bring it in conflict with the clause of the constitution above referred to."

Accepting the foregoing as a correct definition of a general law, we think the act in question may be sustained. It applies to all persons in this state engaged in the business of licensed pawnbrokers, and makes all persons engaged in that business amenable to its provisions. And if we look into the reason of the law it is not without good and valid reasons to support it. It is well known that persons frequenting the offices of pawnbrokers are generally the reckless and needy and improvident, who require the protection of the law. To no other class of money-lenders do the same reasons apply. Men driven by the necessities of their situation resort to the pawnbroker, and pledge any and all articles in their possession in order to raise money, and they are not particular about the rate of interest charged them. The pawnbroker, also, does a business peculiar to himself. He *always* requires a deposit as security for the amounts loaned, which are usually small; and, in that respect at least, his is a business not carried on by any other person in the state. Pawnbrokers are not allowed to do a certain act, because the legislature in its wisdom deemed it injurious and harmful to the community to permit them to do the prohibited act, but the like necessity for a rule of prohibition did not, in the opinion of the law-making power, apply to any other class of persons in the community. It is only in cases where an act of the legislature clearly violates a provision of the constitution that a court is justified in setting it aside, and we cannot say that the act in question is such.

Writ dismissed, and petitioner remanded.

We concur: MYRICK, J.; THORNTON, J.; MCKINSTRY, J.

(67 Cal. 346)

LEDU v. JIM YET WA. (No. 9,629.)

Filed August 22, 1885.

1. RIPARIAN RIGHTS—STATUTE OF LIMITATIONS—EVIDENCE.

Where, in an action to try the title to a certain water-right, the defendant denied plaintiff's alleged ownership, and set up title by adverse possession, the plaintiff, after proving prior appropriation in himself, might, in order to defeat the defense of the statute of limitations, show in rebuttal that the defendant, before any bar of the statute had attached, had acknowledged the plaintiff's claim, and endeavored to lease the said water-right of defendant.

2. ADVERSE POSSESSION—INSTRUCTIONS.

Where, in action to try title to a water-right, the defense of adverse possession is set up, it is error for the court to instruct the jury that they may find for plaintiff, without taking into consideration such defense of adverse possession.

Commissioners' decision.

Department 2. Appeal from superior court, Nevada county.

J. Caldwell, for appellant.

Cross & Simonds, for respondent.

FOOTE, C. This was a case tried by a jury. The plaintiff claimed ownership of a certain water-right. The defendant denied such ownership, and set up title thereto in his lessor, under the statute of limitations. The plaintiff, after the defendant closed his testimony in chief, took the stand as a witness, and the following question was asked him: "State whether Jim Yet Wa, defendant, came to see you in May, 1882, and if so, for what purpose, and what took place then." The defendant's counsel objected, on the ground that the question sought to bring out evidence, not in rebuttal, but in chief, and irrelevant. The court sustained the objection. Plaintiff's counsel then stated that he expected to prove, and offered to prove, by the witness that the defendant had sought him in May, 1882, and offered to lease the water-right in question for the season, and that the parties differed as to the price to be paid for it, and the lease was not made. This was objected to, and the objection sustained. The plaintiff's wife was then introduced and sworn as a witness, and a similar question asked her. This was objected to, and the objection sustained by the court, because it was not in rebuttal. To these rulings of the court counsel for defendant duly excepted.

We are of opinion that the court erred in not allowing the questions to be answered, and the evidence offered to go to the jury. The plaintiff had shown a prior appropriation of the water-right in himself. The defendant sought to defeat it by holding up the shield of the statute of limitations. It was, therefore, competent for the plaintiff, as a matter of evidence, in order to meet this defense, to show, if he could, that the defendant, before any bar of the statute could have attached, had acknowledged the claim of the plaintiff, and sought to become his lessee for the water-right.

The court refused to give the third instruction asked for by the plaintiff, which was in the following language:

"That if the jury believe, from the evidence, that plaintiff, Jean Ledu, was the first, in point of time, to appropriate and use the waters of Humbug creek, now in dispute, and that plaintiff's appropriation and use thereof was prior in time to that of defendant, and those under whom he claims the same adversely to plaintiff, and that plaintiff has not parted with his right thereto or forfeited the same, the jury will find for the plaintiff."

—And of its own motion gave the following:

"That if the jury believe, from the evidence, that plaintiff, Jean Ledu, was the first, in point of time, to appropriate and use the waters of Humbug creek, now in dispute, and that plaintiff's appropriation and use thereof was prior in time to that of defendant, and those under whom he claims the same adversely to defendant and all other persons, and that his possession was continuous, exclusive, and notorious, and that plaintiff has not parted with his right thereto or forfeited the same, the jury will find for plaintiff."

The court did not err in refusing the instruction No. 3 asked by plaintiff. If given, it would have taken from the jury the defense of adverse possession pleaded by defendant, upon which they should have passed in rendering a verdict for the plaintiff. In other words, the jury, before it could find a verdict for the plaintiff, must have decided the question of adverse possession against defendant. The instruction, if given, would have authorized the jury to find for the plaintiff, without taking into consideration the defense of adverse possession. The instruction given by the court was erroneous for the same reason. The jury were told that they might find a verdict if they chose, without considering the defense above mentioned, set up by defendant.

We are, therefore, of opinion that the judgment and order denying a new trial should be reversed, and a new trial granted, in accordance with the views herein expressed.

I concur: BELCHER, C. C.

SEARLS, C., did not participate in this decision.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for new trial.

(87 Cal. 339)

DREYFUSS v. TOMPKINS. (No. 9,563.)

Filed August 22, 1885.

JUDGMENT—CORRECTION OF CLERICAL ERRORS IN.

Clerical errors in a judgment, where they are shown by the record, may be corrected at any time, so as to make the judgment entry correspond with the judgment rendered; and this may be done even after an appeal and affirmance of the judgment.

Commissioners' decision.

Department 2. Appeal from the superior court, Nevada county.

J. M. Walling, for appellant.

Cross & Simonds, for respondent.

BELCHER, C. C. This was an action to recover the possession or value of certain personal property. The case was tried before a jury, and by the verdict it was found "that the plaintiff is the owner of the property described in the complaint, and entitled to its return, or, if a return thereof cannot be had, then for the sum of four hundred dollars, with interest thereon from June 16, 1882." The judgment was entered up by the clerk on the second day of April, 1883, and, after reciting the verdict, added: "Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said L. W. Dreyfuss have and recover from said E. O. Tompkins costs and disbursements incurred in this action, amounting to the sum of ninety-five 50-100 dollars." The case was then appealed by the defendant to this court, where the judgment and order were affirmed. The *remittitur* was filed in the court below on the twenty-eighth day of February, 1884, and on the next day the plaintiff gave notice of a motion to amend the judgment by inserting after the word "Tompkins" and before "costs" the words, "the property described in the complaint, or, if a return thereof cannot be had, then for the sum of four hundred dollars, with legal interest thereon from June 16, 1882."

At the hearing of the motion counsel for plaintiff read the judgment as entered by the clerk, and introduced no other evidence. The motion was granted, and the judgment was amended accordingly. This appeal is from the order allowing the amendment.

It is well settled that clerical errors in a judgment, where they are shown by the record, may be corrected at any time, so as to make the judgment entry correspond with the judgment rendered. *Swain v. Naglee*, 19 Cal. 127; *Freem. Judgm.* §§ 70, 71. And this may be done even after an appeal and affirmance of the judgment. *Roussel v. Boyle*, 45 Cal. 64.

In this case the error complained of appeared on the face of the record, and it was the duty of the court to correct it on motion. The judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(67 Cal. 349)

In re Estate of ROBERTS. (No. 9,438.)

Filed August 22, 1885.

ESTATE OF DECEDENTS—FAMILY ALLOWANCE.

Where it appears that the estate of a decedent, still in process of settlement, is solvent; that the small amount of personal property set aside to the widow does not afford her any income; that the allowance already made has become exhausted in supplying necessary wants; and that the widow is in poor health and destitute,—a reasonable allowance ought to be made for the widow during the progress of settlement of the estate.

Commissioners' decision.

Department 2. Appeal from superior court, county of Stanislaus.
T. P. Ryan, for appellant.

George W. Schell, for respondent.

FOOTE, C. This is an appeal from an order denying the petition of a widow for a further family allowance. The sum of \$50 per month during six months had been previously allowed her. There is no evidence in the record that the homestead affords any income to the widow. The small amount of personal property set aside to her does not, and the former allowance made has long since become exhausted in supplying her necessary wants. She therefore appears before the court practically destitute and in poor health. The estate is still in process of settlement, and appears to be solvent. This state of facts existing, we are of the opinion that under section 1466, Code Civil Proc., the widow was entitled to have made her by the court below such reasonable allowance as was necessary for her maintenance during the progress of the settlement of her husband's estate. This right seems to have been denied the petitioner, and for that reason we are of opinion that the order of the court below should be reversed, and such allowance made to her as her necessities and the amount of the estate left undistributed in the hands of the executor will warrant.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is reversed.

(67 Cal. 308)

JONES v. MORGAN, Treasurer, etc. (No. 9,962.)

Filed August 18, 1885.

1. COUNTY TREASURER, MANDAMUS AGAINST—ALLEGATIONS IN PETITION.

A petition for a *mandamus* to compel a county treasurer to pay a warrant issued by the county auditor in favor of a petitioner, need not allege that the petitioner's claim was ordered paid by the county supervisors, if the petition state that said supervisors "audited and allowed such claim, and ordered the auditor to draw his warrant in favor of plaintiff on the defendant as treasurer" for the amount thereof. Where such allegations are not denied, they are admitted to be true.

2. DISTRICT ATTORNEY—CONTRACT WITH COUNTY FOR RETAINER—VALIDITY.

A contract by a board of supervisors to retain the county district attorney to attend to county litigation in another county, after the term of his office has expired, is not in effect a contract for the increase of the district attorney's salary, nor is it void because made with him during his term of office.

3. FINDINGS—EVIDENCE.

Findings held sustained by the evidence.

Commissioners' decision.

Department 1. Appeal from superior court, county of Butte.

John H. Gray, for appellant.

T. B. Reardon & Son, for respondent.

FOOTE, C. The plaintiff brought a petition for a writ of mandate in the superior court of Butte county, against the defendant, as treas-

urer of that county, the object being to compel the treasurer to pay a warrant issued to the plaintiff previously by the auditor of the said county. In referring to the action of the board of supervisors of said county, in his petition the plaintiff, among other things, avers :

"That at the said December session of said board of supervisors the said board audited and allowed said claim of plaintiff in the sum of \$500, and ordered the auditor of Butte county to draw a warrant in favor of plaintiff on the defendant, as treasurer of said county, for said sum of \$500."

This petition was demurred to and answered at the same time. The grounds of demurrer were "that the petition did not state facts sufficient to authorize the court to grant the writ of mandate, or to give any relief." The demurrer was overruled. A trial on the merits was then had of the case by the court, a jury being waived. The judgment of the court was to order a peremptory writ of mandate as prayed for, and for costs against the defendant. A new trial was moved for and denied. On this motion a statement was agreed upon in open court, and by a stipulation it was afterwards agreed that it should be the statement upon appeal. From the judgment of the court, and its order denying the motion for a new trial, an appeal was taken.

The only ground relied on in argument by the appellant to reverse the court below in its ruling on the demurrer, is that the complaint did not set out, in reference to the claim of plaintiff, "it was ordered paid," in the very language of the statute. The complaint recited that the board of supervisors of Butte county "audited and allowed said claim of plaintiff in the sum of \$500, and ordered the auditor of Butte county to draw a warrant in favor of plaintiff on the defendant, as treasurer of said county, for said sum of \$500."

It further alleged "that on the twelfth day of December, 1884, the auditor of said county of Butte, in pursuance to said order of the said board of supervisors of said county, issued, drew, and delivered to plaintiff a warrant for said sum of \$500."

The allegations in the complaint thus demurred to, were, we think, entirely full and sufficient. A similar complaint to the one under discussion was held to be good by this court in the case of *Connor v. Morris*, 23 Cal. 451.

Upon the trial of the case at bar, it was stipulated by counsel in open court that the only questions and issues to be submitted to the court were: (1) Is the petitioner the party beneficially interested, and owner of the warrant set forth in the petition? (2) Has the warrant set forth in the petition been duly presented to the defendant for payment, and payment demanded thereof, and payment refused? (3) Has plaintiff (petitioner) suffered any damage by reason of the refusal of defendant to pay the warrant set out in the petition? (4) Is the warrant set forth in the petition founded on a legal claim against the county of Butte?

The court found that the warrant was the property of the peti-

tioner; that it was duly presented to and refused payment by the defendant; and, by reason of such refusal to pay it, no damage had resulted to the plaintiff.

Upon the first three propositions there can be no doubt of the correctness of the findings, and this is so plain that discussion of them is needless. It is strenuously argued by the appellant that the board of supervisors of Butte county *never ordered* the claim of the petitioner to be paid; but, in his answer to the petition, he did not deny the allegations of the complaint upon that point, hence those allegations are, by the pleadings, admitted to be true. It being thus virtually admitted by the pleadings that the question raised by the appellant, above alluded to, is without the issues to be tried, and that, too, by the act of the defendant, he cannot be heard to complain here. The appellant further contends that the trial court erred in overruling his objection to the introduction of warrant "No. 773" in evidence; but as the objector did not see proper to include in the stipulation of issues to be passed on by the court any question as to the validity of the warrant on its face, but expressly agreed to exclude it, by agreeing that the issues thus submitted by the stipulation were the only issues, he could not, under those issues thus limited, be heard legally to object to the introduction of the warrant in evidence, nor can we entertain such objection here.

As to the point made, that the contract was void, and the warrant likewise, because the petitioner sought to have his salary increased, and that in allowing his claim, and ordering the warrant to be drawn for it, the board of supervisors of Butte county increased his salary, it is plain, from the evidence, that no such thing was in contemplation or was done.

The evidence shows that the petitioner was district attorney of Butte county up to January 5, 1885; that the board of supervisors of that county employed him to attend to a case which was not to be tried until his term of office should expire; that the case had been transferred before his employment to Sutter county; and that the petitioner was retained to go into that county and look after the case and protect the interests of Butte county. The board of supervisors in their discretion certainly had the power, in this sort of a case, to employ counsel to attend to Butte county's interests in Sutter county, and the fact that they retained their then district attorney to go out of his own county and attend to the case like any other attorney, and agreed to pay him for it, was not an increase of his salary for anything he had done, or ought to have done, or was to do, while holding his office in Butte county.

But the last and most important objection raised by the defendant is that the contract on which the claim is based is void, for the reason, as he contends, that neither the petitioner could make such a contract with the board of supervisors nor the board of supervisors with him. In this connection it is urged that a district attorney, being by

law the legal adviser of the board of supervisors of his county, cannot make any contract with them as to any employment which entails any payment of money to him other than his compensation fixed by law. It is urged that this cannot be done, because, as a county officer, the district attorney cannot contract with the board of supervisors of a county, he being like a director in a corporation, or a member of a town council, or a member of such board of supervisors. The district attorney is the legal adviser of the board of supervisors of his county, and as to all cases of the county pending in the courts which it is his duty as district attorney to appear in and conduct, he can make no contract with that board to receive any compensation outside of that allowed him by law; but when it is sought by that board to secure his services as an attorney at law, and the services are to be rendered outside of the county of which he is district attorney, and the contract for their rendition is made in good faith, and they are of a character for which such a board, in its discretion, has the lawful right to employ counsel, we are not prepared to say it cannot be done.

The case of *Mayor, etc., v. Muzzy*, 33 Mich. 62, is a case in point. Muzzy was an attorney at law, and also mayor and councilman of the town of Niles. While occupying the municipal office, that corporation employed him as an attorney at law, through its council, to attend to a suit in which it was interested in a neighboring court. He attended to the case in that tribunal, demanded his fee, it was refused payment, and he brought suit for it. On the part of the town the point was urged that by reason of Mr. Muzzy being a municipal officer he could not claim pay for his services as an attorney at law; but the supreme court of Michigan declared that he was entitled to pay for such services, as there had not been shown in the case any fraudulent or collusive conduct on his part, or that of any other of the municipal officials.

In Kansas a county attorney recovered for services performed upon an implied contract in prosecuting a criminal action, in a county of which he was not an officer, the action being one in which his county was interested. *Huffman v. Board Com'rs Greenwood Co.* 23 Kan. 281.

We hold to the doctrine held heretofore by this court in the cases of *Andrews v. Pratt*, 44 Cal. 317, and *San Diego v. San Diego & L. A. R. Co.* 44 Cal. 106; but they were dissimilar to the case under consideration. The petitioner here is neither a member of the board of supervisors of a county, nor a stockholder or director in a railroad corporation, seeking to contract with himself on the part of the corporation or board of which he is a member.

There does not appear in the record before us any evidence that the petitioner has been guilty of the least bad faith in making his contract with the board of supervisors of Butte county, or that he, or any one for him, has exercised any undue influence over that board in the matter; neither is it evidenced in any way that such board of

supervisors was beneficially interested in the claim, or were actuated throughout the transaction by any motive save that proceeding from an honest desire as guardians, so to speak, of protecting, to the best of their skill and judgment, the interests of said county, and in the utmost good faith towards all concerned.

We are of the opinion that the judgment and the order of the court denying a new trial ought to be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(67 Cal. 308)

COGLAN v. BEARD. (No. 9,739.)

Filed August 18, 1885.

1. FINDINGS—SUFFICIENCY OF EVIDENCE—SPECIFICATIONS, SUFFICIENCY OF.

On appeal, the sufficiency of evidence to sustain the findings will not be considered, if the bill of exceptions fails to specify the particulars in which evidence is alleged to be insufficient: and a specification that the "court erred in finding" the facts, is not sufficient.

2. ELECTIONS—BALLOTS AS EVIDENCE OF VOTES.

In a contested election proceeding, the best evidence of the number of votes received by a candidate are the ballots themselves, provided they have not been tampered with, and the burden of proving that fact is on the contestant. The fact that for a certain time the ballots were in the possession of the contestant as *de facto* county clerk, will not of itself render them inadmissible,

3. CONTESTED ELECTION—RETRIAL—EFFECT OF EVIDENCE ON FIRST TRIAL.

On a second trial of a contested election proceeding, the result of the count, as shown by the tabulated statement taken on the first trial, is admissible as tending to show whether the ballots have been tampered with pending the second trial.

Commissioners' decision.

Department 1. Appeal from superior court, county of Sacramento.

See S. C. 2 PAC. REP. 737.

John S. Carey and *W. H. Beatty*, for appellant.

W. C. Van Fleet and *S. S. Holl*, for respondent.

BELCHER, C. C. This is the second appeal in this case. Upon the first appeal the judgment was reversed, and the cause remanded for a new trial. 2 PAC. REP. 737. On the second trial judgment was again rendered in favor of the plaintiff, and from that judgment this appeal is taken.

The findings fully support the judgment, and the only points made by the appellant are that some of the findings are not justified by the evidence, and that the court erred in admitting certain evidence against the objection of the defendant.

1. We cannot review the evidence for the reason that there is in the bill of exceptions no specification of the particulars in which the evidence is alleged to be insufficient to justify the findings. The specification is that "the court erred in finding" certain facts; but

that does not meet the requirements of the Code. Code Civil Proc. § 648. But if the specifications had been sufficient, the point would not have been well taken. There was evidence which, if admissible, was sufficient to justify each of the findings of fact.

2. At the general election held in Sacramento county in November, 1882, the plaintiff and defendant were candidates for election to the office of county clerk. According to the returns of the election, as canvassed by the board of supervisors, the defendant had a plurality of 16 votes, and he received the certificate of election. In due time the plaintiff commenced this proceeding to contest the right of the defendant to the office. The case was tried before the superior court early in December, and in the course of the trial all the ballots cast at the election were brought into court, and counted by the judge presiding. Judgment was rendered in favor of the contestant, and from that judgment Beard appealed on the twenty-second day of December, and within five days thereafter perfected his appeal by filing the necessary bond.

At the time the appeal was taken and perfected, Thomas H. Berkey was clerk of the county, and the contestant, Coglan, was his deputy. Berkey's term expired on the eighth day of January, 1883, and on that day he turned the office and everything pertaining to it over to Coglan, who retained possession up to the time of the second trial of the case. Among other things, of which he thus became custodian, were the ballots cast at the election to which the contest relates. After the ballots were counted on the first trial, they were replaced by Berkey in the vault of the hall of records, and the vault was securely locked. When Berkey surrendered the office to Coglan he turned over to him also the keys to this vault. On the second trial the contestant first proved that the ballots were the genuine ballots delivered to the county clerk by the officers of the election; that they remained securely locked in a vault, and in the same condition as when delivered, up to the time when they were brought into court to be counted on the first trial; that after they were counted they were returned by the judge who had counted them to their respective envelopes, and were again securely and carefully sealed up by him, and a strip of paper was gummed over the opening cut in the envelope, on which he wrote his initials; that they were then returned to the vault and remained there, in no way changed or tampered with, until they were brought into court to be again counted on this trial. The contestant then offered in evidence the ballots from 10 precincts of the county, and asked that they be counted. The defendant objected to the ballots being received in evidence, or counted, upon the ground that it appeared that the said ballots, and all the ballots returned to the county clerk from the several precincts of the county, had been, ever since the eighth day of January, 1883, in the sole and exclusive possession of the contestant; that they had, therefore, not been kept by the officer to whose custody the law committed them;

that they should have been kept by the county clerk; and that contestant is not and never has been the county clerk, but has intruded himself into and usurped the office without any color of right thereto. The court overruled the objection, and the ballots were then counted, the defendant reserving an exception.

We do not think the court erred in its ruling. As soon as all the ballots are counted after an election they must be carefully sealed in a strong envelope by the officers of the election, and must then be delivered to the county clerk, who is required to keep the packages unopened and unaltered for 12 months, unless within that time a contest in regard to the election is commenced and brought to trial. Pol. Code, §§ 1259-1266. In case of a contest, the ballots are the primary and best evidence of the number of votes received by any candidate, provided they have not in any way been tampered with; and the burden is upon the contestant to show that fact. *People v. Holden*, 28 Cal. 133; *Coglan v. Beard*, 2 PAC. REP. 737.

After the eighth day of January, Coglan became the county clerk, *de facto* if not *de jure*, and the law gave him the custody of these ballots, and enjoined upon him the duty of taking care of them. This duty was performed in the interest of the public, and not of himself. When the case came on for trial, the fact that he had had the custody of the ballots should have led, and doubtless did lead, the court to scrutinize them with greater care than it would if they had been produced from the custody of some other person; but it did not, we think, render them wholly inadmissible as evidence. The questions were: "Were they the genuine ballots cast by the voters, and had they been kept in the same condition that they were in when delivered by the officers of the election to the clerk?" These questions being answered in the affirmative, they were receivable in evidence. As was said in *People v. Livingston*, 79 N. Y. 287:

"The preservation of the boxes inviolate being the ultimate object of the statute, if that is in fact accomplished, the omission to observe all the formalities to secure that object is not fatal to the evidence. Such omission would weaken the force of the evidence, and induce greater caution in regarding it, but would not necessarily destroy it."

The rule invoked by counsel for appellant, that it is only as to the public and third persons that the acts of a *de facto* officer are held valid, and that they are not valid when they are for his own benefit, does not apply here. In keeping the ballots Coglan did not act for himself, but for the public, nor is he alone interested in the controversy. "The public is interested in a contest of this character. It is not a matter solely between the parties to the record." *Searcy v. Grow*, 15 Cal. 119. "Theoretically, the people alone are interested in the determination of the controversy involved in this case." *People v. Holden*, 28 Cal. 139.

3. The court admitted in evidence, against the objection of the defendant, a tabulated statement showing the result of the count by

the judge, on the first trial of the case, of the ballots recounted on this trial, and this ruling is assigned as error. When the tabulated statement was offered, it was admitted by counsel for defendant to be correct, and the only objection to it was that it was secondary evidence of the contents of the ballots, and that the ballots were the best and only competent evidence to impeach the returns of the precinct officers.

The principal point made by the defendant was that Cogan had had the custody of the ballots, and had had an opportunity to manipulate and change them, and therefore they were not admissible in evidence at all. And the burden, as we have seen, was upon him to show that they had not been changed. It would seem that anything tending to show that fact was admissible, and what more persuasive evidence could be offered than a comparison of the results of the two counts? Certainly it would seem to follow, if the results were the same, that the ballots must have remained inviolate during all the time Cogan had the custody of them.

We do not think the court erred in receiving and examining the tabulated statement showing the results of the count on the first trial. The judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(67 Cal. 326)

TRYON v. HUNTOON, Adm'r, and others. (No. 9,769.)

Filed August 22, 1885.

1. TRUST—PRESUMPTION OF, ON CONSIDERATION MOVING FROM ANOTHER.

Where the consideration for the transfer of real property to one person is paid by or for another, a presumption arises that a trust is created in favor of the person by or for whom such payment is made; but this presumption may be rebutted by evidence that the parties intended otherwise.

2. DEED—UNCERTAINTY IN DESCRIPTION—STATUTE OF LIMITATIONS.

A deed is void for uncertainty which describes the land intended to be conveyed as "three fractions of lot seven, J and K, 4th and 5th streets, Sacramento city;" but such a deed will be sufficient to give color of title, so that possession under it will, by operation of the statute of limitations, create a perfect title.

3. ACTION TO QUIET TITLE—HEIRS OF DECEDENT MAY MAINTAIN.

The heirs at law of a deceased intestate may maintain or defend an action to quiet title to land in their own name, and without joining the administrator of decedent's estate.

Commissioners' decision.

Department 1. Appeal from superior court, county of Sacramento.

McKune & George, for appellants.

Hart & White, for respondent.

Young & Young, for Huntoon, the administrator.

SEARLS, C. Action to quiet title to the west 20 feet of lot No. 6, and the east 5 feet of lot No. 7, in the block or square bounded by Fourth and Fifth, J and K streets, Sacramento. Plaintiff had judgment, and defendant moved for a new trial, pending which motion, J. S. Huntoon, administrator of the estate of E. L. Billings, deceased, one of the defendants, consented to the dismissal of the action as to him. The motion was overruled as to the defendants L. N. Billings and D. D. Billings, who appeal from the judgment, from the order denying the motion for new trial, and from the order dismissing, as to Huntoon, the motion for new trial.

E. L. Billings, who was a brother of appellants and respondent, died intestate in Sacramento, January 23, 1883. He was a native of Canada, and came to California in 1852, where he accumulated a large property, and continued to reside until his death. When E. L. Billings was about to come to California, his sister, the plaintiff, then 21 years of age, and unmarried, was engaged in teaching school at \$8 per month. From her slender earnings she furnished him \$100 to assist him in defraying the expenses of his journey. In 1858, according to the findings of the court, E. L. Billings procured the owners of the land in dispute to convey the same to his sister, the plaintiff herein, for a consideration of \$7,000, which was paid by him. Before that time, viz., on the twenty-first day of November, 1855, said E. L. Billings had procured the then owners of the premises to convey, and they had conveyed, the undivided one-half of said premises to plaintiff, the consideration for which was paid by Billings. Plaintiff was at that time in Vermont, and knew nothing of the conveyance to her until informed thereof by deceased, who at the same time requested a power of attorney from her authorizing him to take possession of, lease, and sell all lands which she had or might thereafter have in Sacramento city. She executed and returned to deceased the power of attorney.

The question in the court below was as to the nature of the transactions by which title to the property vested in plaintiff. She claims the property was conveyed to her as a gift from her brother on account of the love and affection he bore her; while defendants, on the other hand, assert that the property was only conveyed to her as a convenience, and as a precaution against unforeseen misfortunes in business, and that, deceased having advanced the purchase money, plaintiff took the legal title in trust for him. Under section 853 of the Civil Code it is provided that "when a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." This presumption raised by law in favor of him by whom or for whom payment is made, is based upon the fundamental idea that the parties *must have intended* that he by whom or for whom the purchase price of land is paid, should have an equitable interest therein. Experience has found this intention to

appear so uniformly in such cases as to warrant the inference or presumption of its existence in all cases. The only effect of this presumption is that it arises upon proof of the facts upon which it is predicated, without further proof as to what the real intention of the parties may have been; but it is not an irrefutable presumption. It may be removed or overcome by proof,—by showing that between him who advanced the consideration and the grantee it was *not intended* that a trust should arise in favor of the former.

That was the precise point to which evidence was introduced at the trial of this cause, and the findings of the court below are in favor of the plaintiff on all the issues. We think there was testimony in favor of plaintiff sufficient to support these findings. It would seem that plaintiff was the favorite sister of deceased. She furnished him, in part at least, with the means to come to California. It was with her he corresponded, and from her he sought and obtained information in reference to the other members of his family. Bound to her by ties of affection as well as of blood, and under obligations to her for the aid which made his success in life possible, it is not deemed strange, when fortune had favored him, the deceased was disposed to place in the name of this valued sister the property involved in this action, in order that in case of death she might, to that extent, be preferred to the large number of his other heirs. Under such circumstances we cannot interfere with the findings of fact.

It is objected that title to the east five feet of lot 7 never vested in plaintiff. A deed from Samuel Brannan to Daniel K. Brannan, dated October 11, 1851, and forming a link in plaintiff's chain of title, describes this land as follows: "Three fractions of lot 7, J and K, Fourth and Fifth streets, Sacramento city." This deed is void for uncertainty of description, and no title vested in the grantee, by virtue of said deed, to any portion of lot 7. *Shackleford v. Bailey*, 35 Ill. 387; *Bean v. Thompson*, 19 N. H. 290; *Haven v. Cram*, 1 N. H. 93; *Holme v. Strautman*, 35 Mo. 293. It seems, however, that the grantee under the deed entered into possession, conveyed by deed in due form to one S. S. Crane, in 1854, under whom, by sundry mesne conveyances, plaintiff claims title. The deed was sufficient to give *color of title*, and possession under it for 30 years and upwards by plaintiff and her grantors, claiming title, is sufficient to give a perfect title under the statute of limitations.

But conceding that title to the fraction of lot 7 never vested in plaintiff or her grantors, we fail to see how defendants are benefited thereby. They claim as the heirs at law of E. L. Billings. Their contention is that the very title they would assail is held by plaintiff in trust for them. Its existence is not denied; its validity is not assailed by their answer or cross-complaint; but, as beneficiaries, they ask that plaintiff be adjudged to convey to them. There was a quitclaim deed from one Eli Mayo to E. L. Billings, dated August 8, 1868, admitted in evidence, covering lot 7, and a deed of bargain and sale

to Mayo from L. H. Foote and Richard Jones, dated August 17, 1868, to this same lot. As no title is shown in either or any of the parties thus conveying, nothing can be claimed for these deeds, except that they gave to defendant's intestate color of title, under which to inaugurate an adverse possession to plaintiff; but this claim is met by the finding of the court that the intestate never did hold adversely, but always in subordination to the title vested in plaintiff. The letter from E. L. Billings to his sister, the plaintiff, dated December 4, 1855, was properly excluded. It simply instructed plaintiff as to the proper course to pursue in executing the power of attorney, and contained news as to the health of the writer and mutual friends, and a few items of family matters; and while its admission could have done no harm, it was immaterial to the issues in the case. The testimony of plaintiff on cross-examination, as to a conversation between herself and decedent in 1859, when the latter visited Canada, was proper. She had been called by the defendants as a witness on their behalf, and an attempt had been made to prove by her that she had no knowledge of the deed taken in her name, except that contained in the letters offered in evidence. It was, under these circumstances, proper to show, on cross-examination, that she had other knowledge, gained through her brother's statements, relating to the same subject-matter. Neither do we think the court erred in dismissing the motion for new trial as to the administrator, J. L. Huntoon, at his request. Appellants were in no way injured thereby. By section 1452, Code Civil Proc., appellants, as heirs of E. L. Billings, may, in their own name, maintain or defend an action to quiet the title to the land in controversy. This they have done as fully and effectually as though the administrator had continued to act with them. The right of an administrator to judge for himself, under such circumstances, when to cease litigation, cannot be doubted; and when we consider that judgment had been rendered against him, and that, as the fruits of the dismissal of the motion for new trial, he was absolved from all claim for rents and profits to which the estate in his hands would have been liable under the judgment, we concur in the wisdom of the policy, as well as in the right to adopt it.

After a careful examination of the whole record, we conclude the judgment and orders appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and orders are affirmed.

(67 Cal. 350)

PEOPLE v. PRICE. (No. 20,092.)

Filed August 22, 1885.

1. JURY—INSTRUCTIONS—SETTING ASIDE VERDICT.

An objection that instructions were so given, and the circumstances, by reason of noise, such that the jury did not hear the instructions, must be made at the trial, and the court should be requested to repeat the instructions in such manner and at such time that they could be heard by the jury; and if the case is allowed to go to the jury under such circumstances without objection, the verdict will not be set aside.

2. CONVICTION OF GRAND LARCENY—VERDICT—DECREE OF CRIME.

As there is only one degree of grand larceny, a verdict finding a person, who is charged with the crime of "grand larceny," "guilty as charged," will be sufficient under the statute, which provides that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." Pen. Code Cal. § 1157.

In bank. Appeal from superior court, San Joaquin county.

J. H. & J. E. Budd, for appellant.

The Attorney General, for respondent.

MORRISON, C. J. The defendant was informed against in the superior court of San Joaquin county for the crime of grand larceny, committed by feloniously stealing from the person of another the sum of \$11, and on the trial the jury rendered the following verdict: "We, the jury in the above-entitled cause, find the defendant guilty, and recommend him to the mercy of the court." A motion for a new trial was made in the case, which was denied by the court, and the appeal is prosecuted from the judgment, as well as the order denying the motion for a new trial.

There are two points made in the appeal, the first of which is that the jury did not hear the instructions given by the court. There is no evidence that the instructions were not heard by the jury, excepting the affidavit of the attorney that he did not hear them; and therefore it by no means satisfactorily appears that the point is well taken in fact. But, conceding that it is, it furnishes no reason in law for our interfering with the judgment. If it be true as a matter of fact that the jury did not hear the instructions of the court, because, as stated, there was so much noise in the court-room at the time, the court should have been requested to repeat the instructions in such a manner, and at such a time, that they could have been heard by the jury. It would be unfair to the prosecution to allow the case to go to the jury under such circumstances, and then set aside the verdict, if adverse to the defendant, for any such reason.

The other point is that the verdict is a nullity, inasmuch as it does not conform to section 1157 of the Penal Code, which provides that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

The only question in the case is whether the crime with which the defendant was charged, and of which he was convicted, is distin-

guished into degrees. If it is, the verdict of the jury is clearly imperfect and bad under the foregoing section of the Penal Code. By section 486 of the Penal Code larceny is divided into two degrees, the first of which is termed "grand larceny," the second "petit larceny;" and by section 487 grand larceny is committed in either of the following cases:

"(1) When the property taken is of a value exceeding fifty dollars. (2) When the property is taken from the person of another. (3) When the property taken is a horse, mare, gelding, cow, steer, bull, calf, mule, jack, goat, sheep, or hog. Sec. 488. Larceny in other cases is petit larceny."

In the case we are now considering the defendant was charged with the crime of grand larceny, inasmuch as he was accused of stealing money from the person of another. It will be observed that the defendant was charged in the information with the crime of grand larceny, and it was further charged that the stolen goods were taken from the person of another. Now, there is, under the law, but one degree of grand larceny,—when the property stolen is of the value of \$50 or \$50,000,—and every larceny committed by taking from the person of another is, in its degree, grand larceny. So that, in either aspect of the case, the charge against the defendant was the crime of grand larceny, which, as already remarked, is without degrees, and the verdict of the jury finding the defendant guilty was, "guilty as charged;" that is to say, guilty of grand larceny. In the case of *People v. Whitely*, 64 Cal. 211, in which the defendant was charged with the crime of grand larceny, the verdict was, "guilty as charged," and it was held sufficient. In our opinion the same rule is justly applicable to the case now before us. There is nothing doubtful or uncertain in the verdict.

Judgment affirmed.

We concur: ROSS, J.; MCKINSTRY, J.; MCKEE, J.; THORNTON, J.; MYRICK, J.

(67 Cal. 330)

FINN v. SPAGNOLI. (No. 11,025.)

Filed August 22, 1885.

1. BILL OF EXCEPTIONS OR STATEMENT, SETTLEMENT OF.

A bill of exceptions or statement may be settled and certified by the judge before whom the case was tried after his term of office has expired, if he has not become disqualified, or by his successor in office, if he be not disqualified. If the former neglects or refuses to act and the latter be disqualified, then the bill of exceptions or statement is to be settled and certified by another judge of the same county, if there be one, or by the judge of an adjoining county. But the judge of a county which is not an adjoining county cannot so act.

2. CHANGE OF VENUE—MOTION FOR NEW TRIAL.

The hearing and disposition of a motion for a new trial is a trial within the meaning of the statute, (Code Civil Proc. Cal. § 398,) which provides for a transfer of a cause for trial to another court, when the judge of the court in which it is pending becomes disqualified.

Commissioners' decision.

Department 2. Appeal from superior court, Amador county.

Eagon & Armstrong, for appellant.

D. B. Spagnoli and A. Caminetti, for respondent.

BELCHER, C. C. The plaintiff recovered judgment against the defendant in the superior court of Amador county on the eighteenth day of November, 1884. Thereafter, within the time allowed by law, the defendant served a notice of his intention to move for a new trial, and prepared and served his statement of the case, and the plaintiff prepared and served amendments to the statement. The statement and amendments were delivered to the clerk of the court for the judge. On the fifth day of January, 1885, the term of office of the judge before whom the case was tried expired, and the attorney who tried the case for the defendant became the judge of the court. Nothing appears to have been done towards settling the plaintiff's statement till the sixth of March, when the plaintiff gave notice of his intention to move that the case be transferred to the superior court of an adjoining county, upon the ground that the judge of the court was disqualified from further acting in the case. This motion was heard on the sixteenth day of March, and at that time the judge of the superior court of Mono county occupied the bench. The motion was denied, and the appeal is from the order denying it.

A bill of exceptions or statement may be settled and certified by the judge before whom the case was tried, after his term of office has expired, if he has not become disqualified, or by his successor in office, if he be not disqualified. If the former neglects or refuses to act, and the latter be disqualified, then the bill of exceptions or statement is to be settled and certified by another judge of the same county, if there be one, or by the judge of an adjoining county. Section 653, Code Civil Proc.; rule 29 of this court. The case was pending in the superior court of Amador county, (Code Civil Proc. § 1049,) and the plaintiff was entitled to have the statement settled and the motion for new trial disposed of without unnecessary delay. Why the statement was not settled by the judge before whom the case was tried does not appear, but it could not be settled by his successor in office, nor by the judge of Mono county, that not being an adjoining county. Section 398, Code Civil Proc., provides:

"If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, * * * it must be transferred for trial to a court the parties may agree upon by stipulation in writing or made in open court, and entered in the minutes; or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist."

It is claimed by the respondent that the case had been tried, and therefore it could not be transferred for trial. This is not correct. "A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When a court hears and deter-

mines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial." *Tregambo v. Comanche M. & M. Co.* 57 Cal. 505.

Within this definition the hearing and disposition of a motion for new trial is a trial. We think the court erred in denying the plaintiff's motion, and that the order appealed from should be reversed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the order is reversed.

SUPREME COURT OF UTAH.

(4 Utah, 187)

SMITH v. IRELAND.

Filed August 7, 1885.

PRACTICE—VERDICT—SPECIAL VERDICT.

It is within the discretion of the court to direct a general or special verdict, or special as to the controverted parts and general as to those not controverted on the trial.

Williams & Remick, for plaintiff.

Kimball & Haywood, for defendant.

ZANE, C. J. This is an action of claim and delivery, appealed from the First district court. The defendant pleaded justification as marshal under an execution issued on a judgment against W. S. Hopson and in favor of Idleman Bros., and that the property described in the complaint was owned by Hopson, and by him sold to plaintiff before the levy to hinder and delay Idleman Bros. and other creditors in the collection of their debts. Under the instructions of the court the evidence was submitted to a jury, with directions to find on the following questions: (1) Was Hopson at the time of sale indebted to Idleman Bros.? (2) Did Hopson sell to plaintiff to delay, hinder, or defraud his creditors generally in the collection of their debts, or the firm of Idleman Bros.? (3) Did plaintiff at the time of sale have notice that Hopson was indebted to Idleman Bros., and that the sale was made to hinder and delay them in the collection of their debt? (4) What was the value of the property taken by defendant? (5) Is the defendant entitled to a return of the property described in the complaint? To the fourth question the jury answered, "\$1,500," and to each of the others, simply "Yes." When considered with respect to the question alone, the second answer is quite indefinite; but, viewed with the other questions and answers the intention of the jury is sufficiently clear. The plaintiff's counsel makes the point that the fifth interrogatory submitted a question of law to the jury. Section 1400, Comp. Laws Utah 1876, declares:

"A general verdict is that by which they [the jury] pronounce generally upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict shall present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact shall be so presented as that nothing shall remain to the court but to draw from them conclusions of law."

This statute contemplates three classes of verdicts: (1) General; (2) special; (3) general and special. A general verdict is a direct statement of a conclusion of law, and an indirect statement of the facts from which the conclusion is drawn; it expressly affirms the law and inferentially the facts. The jury are directed by the court

to indicate the facts found from the evidence by the statement of a conclusion of law. If they believe certain facts, they are told to state a certain conclusion; and if they do not believe such facts, to state another conclusion. The court states the law applicable to the facts which the evidence tends to prove, and if the jury find the facts they state the conclusion as charged. In case of a general verdict the court states the law applicable to the facts before they are found by the jury, and in a special verdict the jury find the facts first and the court declares the laws applicable to them afterwards. In either case the jury judge of the facts and the court of the law. In the third class of verdicts the jury state the conclusion of law applicable to the material facts, as to which there is but little or no room for controversy, without mentioning them in their verdict, and specifically name the material facts mainly contested on the trial, without stating the conclusion of law applicable to them. The court reserves the right to make that statement after the finding of the jury.

There was no room for controversy as to the existence of the material facts of the case, aside from those specifically found. The controverted facts essential to the conclusion of law, of which the fifth finding was a statement, were specifically stated in other findings. It was within the discretion of the court to direct a general or special verdict, or special as to the controverted facts, and general as to those not controverted on the trial. We find no error in the submission of questions to the jury, or in the refusal to submit others requested by the plaintiff. And the verdict embraces all the material issues, and is sufficiently specific.

The plaintiff insists that the findings of the jury are not sustained by the evidence. The alleged sale by Hopson to plaintiff was on March 21, 1883. The defendant insisted that it was made to hinder, delay, and defraud the creditors of Hopson, and that plaintiff knew it. The plaintiff testified he was tending bar for Hopson on the day of sale, and had been with him for several months; that he knew Idleman Bros.; that Lachs was their traveling agent, and that he was in the saloon the day before the sale, when Lachs was there; that he knew Hopson was in debt to Idleman Bros., and heard Hopson say he must get money to pay his debts. On same day, but after sale, heard Hopson say he had sold out to raise money to pay his debts; that bill of sale to witness was made about 11 o'clock A. M., March 21, 1883, and the preliminary invoice was made the preceding day. As shown by it, the cost of stock was \$1,900. Mr. Lachs, traveling salesman of Idleman Bros., testified that the day before the sale he had conversation with Hopson in his saloon, and plaintiff was there, and could have heard it; that witness asked Hopson for money, and said to him he was collecting that trip, and must have the money; that Hopson said he would try to raise some; witness supposed plaintiff heard the conversation,—it occurred in the afternoon; the next morning, about 9 o'clock, had another conversation with Hopson in his sa-

loon, and Smith was there; that the debt was mentioned, and Hopson then said he would raise witness some money; was there paying some to Woolner; witness went to the saloon again same forenoon, and Hopson paid him \$100, and said he had sold out to Smith; several other persons were there. The foregoing was the most important testimony for the defendant. It was contradicted in some important respects by the testimony for the plaintiff. The relations of Hopson and plaintiff, their associations and conduct, their business and financial necessities and conditions, with the circumstances which preceded, attended, and followed the sale, as shown by the evidence, with the other evidence, when all considered together, affords inference that the sale to plaintiff was made to prevent and hinder the defendants in the collection of their debt.

The contention before the jury was chiefly as to the good faith of the plaintiff in taking the bill of sale from Hopson. The evidence was conflicting, and the jury found the issues for the defendant. The authorities are to the effect that a court will not set aside a verdict unless satisfied it is against a clear preponderance of the evidence. In view of all the evidence we are not satisfied the verdict is wrong. O. Vandercook, the officer who levied the execution, was asked by defendant's counsel what Hopson said when witness demanded payment, and answered that Hopson said "he had no property to levy on; had money, but would not pay; and that nobody could go through his pockets." Objections to the question and answer were interposed by plaintiff, and overruled by the court, and exceptions taken. Defendant's counsel also asked witness Mr. Lachs what Hopson said to him on the same day, but subsequent to the sale, and he answered in substance as above. Objections to this question and answer were also made by plaintiff, and overruled by the court, and exceptions were taken by plaintiff.

The admission of this evidence plaintiff assigns as error. Proof of a demand by the officer, and the answer of Hopson that he had no property to levy on, was competent; but the further answer, that "he had money and nobody could go through his pockets," was incompetent; as was the answer of Lachs that Hopson said after the sale he had money in his pocket but would not pay, and nobody could get it. Other evidence before the jury showed that Hopson had money after the sale, and his refusal to pay more than the \$100 paid, and 25 per cent. of the remaining debt, which was offered in satisfaction but not accepted. Without the objectionable testimony there was sufficient evidence to show that Hopson had money, which he refused to pay on his debt to defendant. The testimony objected to did not tend to prove that plaintiff acted in bad faith, because it does not appear he knew of the statements of Hopson, or assented to them. Bad faith on the part of plaintiff was the question about which there was the most room for controversy. The probabilities are the jury would have reached the same conclusion without the incompetent testimony.

In view of all the evidence, we incline to the opinion that the jury did substantial justice, and that the errors complained of are not sufficient to reverse this case. We find no other error in this record. The judgment of the court below is affirmed.

EMERSON and TWISS, JJ., concurred.

SUPREME COURT OF CALIFORNIA.

(67 Cal. 332)

BOTTO v. VANDAMENT. (No. 11,024.)

Filed August 22, 1885.

JUDGMENT ON PLEADINGS, WHEN RENDERED.

It is only where an answer admits or leaves undenied all material facts stated in the complaint that a judgment can be rendered on the pleadings. If the answer leaves an issue which the defendant is entitled to have tried, such a judgment cannot be rendered.

Commissioners' decision.

Department 2. Appeal from superior court, county of Amador.

Eagon & Armstrong, for appellant.

A. Caminetti and R. C. Rust, for respondent.

FOOTE, C. This cause comes here from the superior court of Amador county, on appeal from a judgment for the plaintiff on the pleadings. Plaintiff sued for damages for the taking of water from a ditch belonging to her, and for the restitution of certain water and water privileges, and prays for a perpetual injunction to restrain the defendant from further using or interfering with said water or water privileges.

The defendant denied specifically the allegations of the complaint, pleaded the statute of limitations of five years, under section 319, Code Civil Proc., and as a further and separate defense pleaded that his wife, Julia A. Vandament, was the true owner of the ditch, the water, and water privileges, and that he, by her permission and as her agent, was using the same, and disclaimed any further right of possession to or interest in the subject-matter of the suit.

The case at bar being in this condition, a motion was made by the plaintiff for judgment on the pleadings, and that motion was granted, and judgment in accordance with it rendered by the trial court.

This court said in the case of *Hicks v. Lovell*, 64 Cal. 17, citing *Prost v. More*, 40 Cal. 347: "It is only where an answer admits or leaves undenied the material facts stated in the complaint that a judgment can be rendered on the pleadings." It has been also held by this court, in the cases of *Nudd v. Thompson*, 34 Cal. 39, and *Amador Co. v. Butterfield*, 51 Cal. 526, that judgment cannot be rendered on the pleadings where the material allegations of the complaint are denied in the answer, even if the answer sets up a special defense, separately stated, which admits the allegations formerly denied. No motion was made to strike out any part of the answer, or any demurrer interposed."

If it be true that the several defenses set up in the answer are not consistent with each other, nevertheless a moving party would not be entitled on that account to judgment on the pleadings, as this court

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has held in *Buhne v. Corbett*, 43 Cal. 269; *Billings v. Drew*, 52 Cal. 565; and other well-known cases.

In this case a plea of the statute of limitations was set up, and was neither stricken out nor demurred to, hence an issue of fact remained which the defendant was entitled to have tried. And the defense set up, that the defendant's wife owned the subject-matter of the suit, and that he, as her agent and by her authority, was in possession of and using the same, raised another issue of fact entitled to trial. *Farmers' & Mechanics' Bank v. Christensen*, 51 Cal. 571.

The judgment on the pleadings rendered in this case is not warranted in law, and a new trial ought to be granted, in accordance with the views herein expressed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

(67 Cal. 334)

FULKERTH v. COUNTY OF STANISLAUS. (No. 8,370.)

Filed August 22, 1885.

SHERIFFS—COMPENSATION FOR FOOD FURNISHED PRISONERS.

Sheriffs are entitled to be paid a reasonable compensation for necessary food furnished to prisoners in jail, and the determination of what is a reasonable compensation rests, in the first instance, with the board of supervisors; but if the sheriff is dissatisfied with their determination he may sue the county for what he claims to be a reasonable amount.

Commissioners' decision.

Department 2. Appeal from superior court, county of Stanislaus.
C. C. Wright, for appellant.

W. O. Minor, for respondent.

BELCHER, C. C. The plaintiff was sheriff of the defendant county during the year 1881, and as such furnished meals to the prisoners confined in the county jail. For the meals so furnished he made out an account in proper form and duly verified, and presented it to the board of supervisors for allowance. In this account he charged 25 cents for each meal furnished. The board acted upon the account and found it to be a proper county charge, but considering it greater in amount than was justly due, allowed 20 cents only for each meal. The plaintiff, being dissatisfied with the amount allowed him, within six months after the final action of the board, commenced this action to recover the amount claimed by him to be due. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and its demurrer was sustained. The plaintiff declined to amend his complaint, and thereupon judgment was entered in favor of the defendant. The appeal is from this judgment.

For the respondent it is insisted—and this is the only point made—that the board of supervisors, in allowing or disallowing claims against the county, acts in a *quasi* judicial capacity, and that its action in this case was made final and conclusive by the provisions of section 1611 of the Penal Code. That section reads as follows:

“The sheriff must receive all persons committed to the jail by competent authority, and provide them with necessary food, clothing, and bedding, for which he shall be allowed a reasonable compensation, to be determined by the board of supervisors.”

We do not think the words “to be determined by the board of supervisors” had the meaning and effect claimed for them. All claims against the county must be presented to the board of supervisors for allowance, and where the amount of the claim has not been fixed by statute, or the judgment of some competent court, the board is required, if it be a proper county charge, to find and allow the amount which is justly due. Pol. Code, § 4074. If the board allows less than is claimed, and claimant is dissatisfied with the amount allowed him on his account, he “may sue the county therefor at any time within six months after the final action of the board, but not afterwards; and if in such action judgment is recovered for more than the board allowed, on presentation of the judgment the board must allow and pay the same, together with the costs adjudged; but if no more is recovered than the board allowed, the board must pay the claimant no more than was originally allowed.” Pol. Code, § 4075.

This provision is general, and applies to all accounts presented against the county. By subdivision 4 of section 4344 of the same Code, the “expenses necessarily incurred in the support of persons charged with or convicted of crimes, and committed therefor to the county jail,” are made county charges.

The plaintiff, having furnished “necessary food” to the prisoners in jail, was entitled to a “reasonable compensation” therefor. What was a reasonable compensation was to be determined by the board of supervisors in the first instance; but that determination was no more final than would have been the finding by the board of the amount which was justly due, if the account had been presented for any other proper county charge. “To determine what is a reasonable compensation,” and “to find what is justly due,” are expressions, we think, of equivalent import. The plaintiff, being dissatisfied with the amount allowed him on his account, had the right, therefore, to sue the county for the amount which he claimed to be reasonable.

The cases cited by counsel for respondent from the reports of this state do not touch the question involved here, and those cited from New York are not in point, for the reason that no law existed in that state providing for suit upon a claim disallowed in whole or in part by the board. *Chase v. County of Saratoga*, 33 Barb. 603; *Martin v. Board Sup'rs*, 29 N. Y. 645; *Price v. County of Sacramento*, 6 Cal. 254.

Judgment should be reversed and the cause remanded, with direction to the court below to overrule the demurrer.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with direction to the court below to overrule the demurrer.

(87 Cal. 337)

PENDOLA v. ALEXANDERSON and others. (No. 9,982.)

Filed August 22, 1885.

FORECLOSURE OF MORTGAGES—PURCHASER AT FORECLOSURE SALE—RENTS AND PROFITS.

A mortgagee purchasing at the foreclosure sale is not entitled to any of the rents and profits which accrued prior to the time of his purchase, nor can he maintain an action against a receiver of the property for rents and profits which he claims until they have been collected and received by the receiver.

Commissioners' decision.

Department 2. Appeal from superior court, county of Sierra.

Van Clief & Wehe, for appellant.

John Gale, for respondent.

BELCHER, C. C. The defendants Andrew and Nellie Alexanderson were husband and wife, and had one minor child. They had no common property, but the husband owned all the property described in the complaint as his separate property. On the second day of November, 1881, the wife commenced an action against her husband for a divorce, and asked for the custody of the child and for alimony; and on the same day filed a notice of *lis pendens*, containing the names of the parties, the object of the action, and a description of the property of the husband. After the filing of the *lis pendens*, but on the same day, the appellant, Pendola, in good faith, and without any intention of preventing the wife from securing the payment of any alimony that might be adjudged to her, took a mortgage from the husband upon all of his said separate property to secure an indebtedness of about \$1,100, which mortgage was then duly recorded. On the twelfth day of November, 1881, the action for divorce was tried, and a decree entered granting to the plaintiff a divorce, the custody of the minor child, and alimony at the rate of \$45 per month, until the further order of the court, payable out of the rents, issues, and profits of the said separate property of the husband; and it was further decreed that the alimony "be a first charge" upon the said property. To secure the payment of the alimony the court appointed the defendant Fendingham receiver, with authority to take possession of the property, and to collect and pay over the rents, issues, and profits thereof. Fendingham accepted the trust, and continued to act under his appointment until this action was tried. In March,

1884, the appellant commenced an action to foreclose his mortgage, but did not make Fendingham or Nellie Alexanderson parties to the action. In June he obtained a decree of foreclosure, and under that decree, on the nineteenth day of July, 1884, all of the mortgaged property was sold and bid in by him for the sum of \$1,268.59, the amount then due, with costs of sale.

This action was commenced on the twenty-first day of July, 1884, to recover from the receiver, Fendingham, "all the proceeds, rents, issues, and profits received or to be received by him from the property above described as that sold to plaintiff by said sheriff," and for such other relief as should seem equitable. This case was tried, and on the twenty-ninth day of September judgment was entered, in effect requiring the receiver, within 10 days after service on him of a copy of the judgment, to pay to Nellie Alexanderson the amount due her for alimony up to July 21, 1884, and to pay to the clerk of the court, for the use and benefit of the plaintiff, all the balance of the money then in his hands derived from the rents, issues, and profits of the property which he had held as receiver, less the expenses of his receivership; and it further required him to render to the court a full account of his receipts and his disbursements at the time of such payments. The appeal is from this judgment, and rests upon the judgment roll.

It is not easy to see how appellant can complain of the judgment. He was not entitled to receive any of the rents and profits which accrued prior to the time of his purchase of the property at the sheriff's sale, (Code Civil Proc. § 707,) and that was only two days before this action was commenced. Nor could he sue and recover for such rents and profits until they were collected and received by the defendant. It does not appear that any rents and profits from the property came into the hands of the receiver during those two days, or even during the two months and twelve days which elapsed between the time of his purchase and the entry of the judgment. Under the circumstances, it would seem that the appellant took under the judgment all that he could possibly be entitled to.

The question discussed by the counsel, as to whether the filing of the *lis pendens* and the subsequent judgment awarding alimony created a lien on the property superior to the lien of the mortgage, does not arise in the case.

The judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

Estate of ROBERTS. (No. 9,942.)

Filed August 22, 1885.

ORDERS AFFIRMED.

Commissioners' decision.

Department 2. Appeal from superior court, county of Stanislaus. This appeal is taken from an order overruling a demurrer to a petition for partial distribution of decedent's estate, and from the order decreeing such distribution. The petition below was opposed by the executors, on the ground that decedent's widow had petitioned for further family allowance, which petition had been denied and was pending on appeal, and that, pending such appeal, it could not be determined what amount of such estate should be distributed.

E. T. Stone, for appellant.

Geo. W. Schell, for respondent.

FOOTE, C. This is an appeal from an order overruling a demurrer, and one making partial distribution of a small estate. The demurrer to the petition was properly overruled. All the distributees of the estate were parties applying for or consenting to the distribution. The executor of the estate to be distributed objects to the action of the trial court. We are of opinion that the orders of the court below, made in the premises, should be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the orders are affirmed.

(67 Cal. 362)

DE LAURENCEL v. DE BOOM. (No. 8,691.)

Filed August 24, 1885.

WILLS—DEVISE TO PERSONS AS A CLASS.

Devise to decedent's next of kin surviving, viz., the three De Laurencels, children of a deceased sister, and five De Booms, children of a deceased brother, under a direction that all the property was devised in trust for a certain time, and then to go to the De Booms and De Laurencels, is a devise to them as a class, and as such they are entitled to share equally.

Department 2. Appeal from superior court, city and county of San Francisco.

Edward J. Pringle, for appellant.

J. H. Reardon, for respondent.

MYRICK, J. Jean Corneille de Boom was a naturalized citizen of the United States. He died in 1870, domiciled in France. His next of kin him surviving were three De Laurencels, children of a deceased sister, and five De Booms, children of a deceased brother. He left some property in France, but the bulk of his property was in this state, consisting of real and personal estate. By the will of the deceased

(which has been probated, and the property distributed accordingly) all his property was devised to his nephew, Romain Camille de Boom, in trust for certain specified purposes, with a direction that after the expiration of 10 years the same was to go to the De Booms and De Laurencels. In what proportion, is the question before us. It is contended on behalf of the De Laurencels that the nephews and nieces are to take as by right of representation according to the law of France, giving to them one-half the property, the other half going to the De Booms; while it is contended on behalf of the De Booms that the property is to be divided in equal proportions among all. The court below decreed in accordance with the latter proposition. The instructions left by the deceased for the guidance of the trustee contain the following clause:

"After 10 years of administration, and after having settled with the greater portion of the creditors, you will raise money enough to pay the balance in full. At that time you shall also disclose to all my heirs, the De Booms as well as the Laurencels, the state of my succession, and the manner in which you intend, either immediately or later, to place them in possession, each for what comes to him; and, if you do not elect a distribution of my succession at the expiration of 10 years after my death, after a settlement with the creditors you will account to and pay over to each of my heirs the revenues as you receive them. Confiding in your fidelity, I leave it to you to distribute either the whole or a part of the capital of my estate among my heirs, or the revenues only, during 20 years from the date of my death."

In cases of intestacy there can be no doubt of the proposition as to real property that the law of its situation will control. Story, *Conf. Laws*, § 474, and note. In general, it is held as to personal property that the law of the domicile will control, unless there be a local law directing otherwise. But the deceased did not die intestate; he left a will with instructions, under which will and instructions the trustee holds the property. We must therefore look at the will and instructions, holding them, as it were, by the four corners, to see if we can ascertain his intentions. He made "all my heirs, the De Booms as well as the Laurencels," the recipients of the proposed bounty. We are of opinion that when the testator said his property was to go to all his heirs, the De Booms as well as the Laurencels, he did not mean in the proportions directed by the law of his domicile, nor according to the law of succession in this state in cases of intestacy, but he said, in effect, "the De Booms and Laurencels are my heirs, and I wish them to have my bounty." The words "all my heirs" are not to be taken in this case solely as meaning those who take in case of intestacy, but are to be considered in their relation to the words, "the De Booms as well as the Laurencels." The testator did not mean that all persons named De Boom or Laurencel should take; but that the persons of either name who stood in an inheritable relation to him should take. Both families did stand in that relation, and, so standing and being thus grouped, the principle comes in that where a class is named as devisees, all of that class shall

share, and shall share equally. In this view, we think the language used by the testator is clear, and expressed the intention that the relatives named in the record shall take equally. Order affirmed.

We concur: THORNTON, J.; MORRISON, C. J.

(2 Cal. Unrep. 518)

GRANGER v. BOURN. (No. 9,906.)

Filed August 25, 1885.

CORPORATIONS—GUARANTY, CONSIDERATION FOR.

A guaranty is without consideration where founded on an alleged agreement executed by officers of a corporation, when they have no authority to execute it.

Department 2. Appeal from superior court, county of Nevada.

Walling & Gaylord and *A. W. Thompson*, for appellant.

Cross & Simonds, for respondent.

BY THE COURT. If the original E. M. & M. Co. had agreed, as a portion of the consideration of the conveyance to it by Bourn of the property conveyed, that it assumed and would pay all debts which he had contracted in and about the affairs of the mine, doubtless such agreement would have authorized the officers of the corporation to assume and agree to pay such debts; and, its obligation to that end being binding upon it, a discharge of Bourn by creditors from liability on such debts would have been founded upon a consideration. But, in the case before us, the alleged guaranty, signed by plaintiff, and the receipt by Watt were without consideration, because they were founded on an alleged agreement executed by the officers of the corporation which they had no authority to execute; therefore, the plaintiff received no consideration. He received a piece of paper on which was written, so far as \$1,150 thereof was concerned, a promise to pay, which promise he, as well as the officers who signed it, were in law presumed to know was of no validity as against the corporation. Such being the case, the receipt and the guaranty constituted no defense to the action on the agreement in suit, and the plaintiff was entitled to recover.

Judgment and order affirmed.

(67 Cal. 377)

SCHAEFER v. EDGAR, Auditor, etc. (No. 11,032.)

Filed August 26, 1885.

MANDAMUS—APPEAL BY COUNTY AUDITOR—UNDERTAKING.

A county auditor, in a *mandamus* to compel him to issue a warrant upon the county treasurer for payment of a certain sum of money, does not act in his individual capacity, and the court may, on an appeal being taken by him to the supreme court, dispense with an undertaking on appeal.

In bank. Appeal from superior court, city and county of San Francisco. Hearing on motion to dismiss appeal.

John Lord Love, for appellant.

E. A. & Geo. E. Lawrence, for respondent.

Ross, J. This is an appeal taken by the defendant from a judgment of the superior court directing a writ of mandate to issue compelling the defendant, as auditor of the city and county of San Francisco, to issue to the plaintiff a warrant upon the treasurer of the city and county for the payment of a certain sum of money. The court below, by an order made, dispensed with an undertaking on appeal on the part of the appellant, by virtue of that portion of section 946 of the Code of Civil Procedure which provides that "the court below may, in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right."

In taking the appeal the defendant was not acting in his individual capacity, for in that capacity he was not a party to the proceeding. He was proceeded against in his official capacity as auditor; it was against him as auditor that the judgment went in the court below, and in that capacity only could he appeal. He was not acting, therefore, in his own individual right, but in that of the city and county. The case, therefore, falls within the provision of the Code of Procedure cited, and the motion to dismiss the appeal is therefore denied.

We concur: MCKINSTY, J.; MORRISON, C. J.; THORNTON, J.; MYRICK, J.; MCKEE, J.

(2 Cal. Unrep. 520)

COX v. HAYES. (No. 9,903.)

Filed August 26, 1885.

EJECTMENT, RECOVERY IN—STRENGTH OF TITLE.

Plaintiff in ejectment must recover on the strength of his own title; and, if both parties claim under a common grantor, a prior deed to plaintiff cannot be enlarged by a subsequent deed to the defendant.

Department 1. Appeal from superior court, Butte county.

Reardon & Freer, for appellant.

I. S. Belcher, for respondent.

Ross, J. The only difference between the case as now presented and as presented on the former appeal (64 Cal. 32) is that on the last trial the plaintiff was permitted, against the objection and exception of the defendant, to put in evidence a deed from Hudson, the common grantor, to the defendant of "the north-east quarter of section 16, Tp. 17 N., R. 3 E., excepting therefrom a certain strip of said quarter section, sold by F. R. and A. O. Larkin to A. W. Campbell, and also the easterly one hundred acres of said quarter section, sold by W. K. Hudson to A. Fraser and Thomas Cox."

It was held on the former appeal that the deed from Hudson to Fraser and Cox conveyed only 77.71 acres, which excluded the prem-

ises in controversy. We know of no principle upon which the former conveyance to the plaintiff can be held enlarged by the subsequent conveyance to the defendant. The circumstance that the deed to the defendant may not have conveyed to him the property in dispute does not aid the plaintiff in this action of ejectment, where the plaintiff must recover on the strength of his own title. Judgment affirmed.

We concur: MCKINSTRY, J.; MCKEE, J.

(2 Cal. Unrep. 523)

POTTER and others v. ROETH. (No. 8,460.)

Filed August 26, 1885.

EQUITY—RESCISSION OF CONTRACT FOR FRAUD.

On the principle that he who seeks equity must do equity the plaintiff, in an action to compel the reconveyance of land, must aver his willingness to restore to the defendant the consideration paid by him.

Department 1. Appeal from superior court, Alameda county. Action to compel reconveyance of land. The consideration for the deed of the land was a half-interest in a fruit business, the value of which plaintiffs allege that defendant fraudulently overstated. Complainants failed to aver a willingness that the sale of the interest in the fruit business be set aside, and that the same be restored to defendant.

Geo. E. Whitney, for appellants.

Wm. A. Cornwall, for respondent.

By THE COURT. Upon the principle that he who seeks equity must do equity the demurrer to the complaint should have been sustained. Judgment reversed and cause remanded, with directions to the court below to sustain the demurrer.

PEOPLE v. MCGINN. (No. 20,066.)

Filed August 26, 1885.

GRAND LARCENY—ORDER GRANTING NEW TRIAL AFFIRMED.

In bank. Appeal from superior court, Sierra county.

The Attorney General, for appellant.

Hundley & Gale, for respondent.

By THE COURT. The defendant, having been convicted of the crime of grand larceny, was granted a new trial by the court before which he was tried. It would require a very plain case on the part of the prosecution to justify us in disturbing the order. An examination of the record satisfies us that we ought not to do so in this case. Order affirmed.

(67 Cal. 380)

STATE v. LYONS. (No. 9,986.)

Filed August 27, 1885.

ALIENS—RIGHT TO INHERIT PROPERTY.

A person who was born and has always resided in Ireland, and has never been in the United States, is an alien, and is entitled, as such, to inherit property in this state; and he may take it by succession, though he does not come here to make a claim to it.

Commissioners' decision.

Department 1. Appeal from superior court, county of Sacramento.

S. P. Scaniker and the Attorney General, for appellant.

Henry Perry, for respondent.

BELCHER, C. C. John Guilford, a resident of Alameda county, died in that county, intestate, in December, 1876, leaving real and personal property, but no heirs, in this state. The public administrator of the county was appointed administrator of the estate and took possession of all its property. In 1879 the attorney general, in pursuance of the provisions of section 1269 of the Code of Civil Procedure, filed an information on behalf of the state in the proper district court, in which he set forth all the facts required by that section, and prayed for a judgment of the court that the state be seized of the property of the estate. Summons was issued on the information, and served on the administrator of the estate and the county treasurer of Alameda county, and an order was made and published as required by law. The administrator and county treasurer appeared and filed answers, admitting all the allegations of the information to be true. No one else appeared, and thereupon judgment was rendered that the state be seized of the lands and tenements in the information claimed. This proceeding was commenced in the superior court of Sacramento county, under the provisions of section 1272 of the Code of Civil Procedure. In their petition the petitioners described themselves as all residents of the county of Dublin, Ireland, and allege that they are the heirs at law, and only heirs, of John Guilford, deceased, and that they had no notice, actual or constructive, of the proceedings under the information. The petition was signed by the petitioners, by their attorney in fact and attorney at law, and was served on the attorney general, who appeared and answered thereto by a general denial. The case was tried by the court, and judgment rendered in favor of the petitioners. From that judgment this appeal is taken.

It is now claimed on behalf of the state that the judgment was wrong and should be reversed, because the petitioners were residents of Ireland, and therefore were not permitted, under our constitution and laws, to take property by succession. Section 671 of the Civil Code provides that "any person, whether citizen or alien, may take hold, and dispose of property, real or personal, within this state;" but

it is insisted that the petitioners were neither citizens nor aliens, and therefore not within its provisions. The word "alien," it is said, means a person who was born in another country, and has come to this country and is here residing, either permanently or temporarily; in the one case being a resident alien, and in the other, a non-resident alien. This position cannot be maintained. According to Webster the word "alien" means "a foreigner; one born in or belonging to another country. * * * In American law, one born out of the jurisdiction of the United States and not naturalized;" and the word "foreigner," "a person belonging to a foreign country, or without the country or jurisdiction under consideration."

In *Dawson's Lessee v. Godfrey*, 4 Cranch, 321, it was held that a person who was born in England, and always resided there, and was never in the United States, was an alien. See, also, *Jones v. Mc-Masters*, 20 How. 8.

It is next claimed that under section 17 of article 1 of the constitution of the state only those foreigners who are *bona fide* residents of this state can inherit property here, and that all the provisions of the Codes which give the right to inherit to foreigners who are not *bona fide* residents are inconsistent with the provisions of that section, and are repealed by section 1 of article 22 of the constitution. A sufficient answer to this is found in the fact that in two well-considered cases this court has held otherwise, and we are satisfied with those decisions. *People v. Rogers*, 13 Cal. 159; *Estate of Billings*, 1 PAC. REP. 701. See, also, *Purczell v. Smidt*, 21 Iowa, 540.

It is also earnestly insisted that no non-resident alien can take property in this state by succession unless he comes here in person to claim the same, and that the petitioners failed to do that, and therefore their judgment must be reversed. The Civil Code provides as follows:

"Sec. 672. If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property, in such case, is disposed of as provided in title 8, pt. 3, Code Civil Proc."

"Sec. 1404. Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

Title 8, pt. 3, Code Civil Proc., relates to escheated estates, and section 1272 provides:

"Within twenty years after judgment in any proceeding had under this title, a person, not a party or privy to such proceeding, may file a petition in the superior court of the county of Sacramento, showing his claim or right to the property, or the proceeds thereof. * * * All persons who fail to appear and file their petitions within the time limited are forever barred, saving, however, to infants, married women, and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file

their petitions at any time within the time limited, or five years after their respective disabilities cease."

There is nothing in the record to show that this point was made in the court below, or that the petitioners did not appear in person, except the fact that they describe themselves in their petitions as "all residing in the county of Dublin, Ireland," and the further fact that the petition is signed by their attorney in fact and attorney at law.

But assuming that they did not come to this state in person to file their petition and claim the property, was it necessary that they should? We do not think it was. The general rule is that parties, whether plaintiff or defendant, resident or non-resident, may appear in court to claim their supposed rights, either in person or by attorney. The plaintiff appears when he files his complaint, subscribed by himself or his attorney. The defendant appears when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. Either party may appear in an action though he be not, and never was, in this state. Why should the word "appear," as used in the above-quoted sections of the Codes, have any other or different meaning than that ordinarily given to it? We cannot doubt that if the legislature had intended to say that no non-resident alien could claim any property in this state by succession, unless he came here in person to make his claim, it would have used other language showing clearly its meaning.

The last point made is that, under section 4 of article 9 of the constitution, upon the death of Guilford, all his property vested, *eo instanti* and absolutely, in the state for the benefit of the school fund, and that it cannot be taken therefrom. That section provides that—

"All estates of deceased persons who may have died without leaving a will or heir * * * shall be and remain a perpetual fund, the interest of which, together with all the rents of the unsold lands, * * * shall be inviolably appropriated to the support of common schools throughout the state."

The fault in the argument is that Guilford did not die without heirs. The petitioners were his heirs, and the property of his estate vested in them, subject to be divested if they did not appear and claim it within the time and in the manner provided by statute.

The case of *State v. Reeder*, 5 Neb. 203, is not in point. In that case the deceased left no heirs, and his estate was held to have vested absolutely and wholly in the state. Under a constitutional provision similar to ours, the proceeds of the estate were placed in the school fund, and the legislature had attempted to divert them to other objects; but the court said the act "is a mere nullity, and confers upon the trustees therein named no rights or power over the estate."

We think the judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(67 Cal. 385)

STATE v. CARRASCO. (No. 9,987.)

Filed August 27, 1885.

ALIENS—RIGHTS IN INHERITANCE, ASSIGNMENT OF.

A non-resident alien may sell his interest in an inheritance, and his assignee may appear and claim under such assignment.

Commissioners' decision.

Department 1. Appeal from superior court, Sacramento county.

S. P. Scaniker, for appellant.

Page & Eells, for respondent.

BELCHER, C. C. It appears in this case that one August Leopold Mongard died intestate in Santa Barbara county in 1870. He left surviving him a widow and one minor child, who were both residing in the republic of Chili. His estate was administered in the probate court of Santa Barbara county, and, after paying all claims against it and the expenses of administration, there was left the sum of \$1,459 in gold coin. No one appeared to claim this money as heir, and, under proceedings commenced by the attorney general in pursuance of the provisions of section 1269, Code Civil Proc., it was paid into the state treasury. The property of the estate was common property, and the minor child died, leaving its mother its only heir. The widow, by an instrument in writing, sold and transferred to Carrasco, the petitioner, all her right to the proceeds of the estate. The petition by Carrasco, under section 1272, Code Civil Proc., that this money be paid over to him, was signed by his attorney in fact and attorneys at law. The case was tried, the attorney general appearing for the state, and judgment rendered in favor of the petitioner. From that judgment the appeal is taken.

This case, in its main features, is the same as the case of *State v. Lyons*, ante, 763, just decided. All the points made in that case are made here, and upon those points nothing more need be said.

It is further claimed in this case that if the widow of the deceased could have appeared and claimed the proceeds of his estate, her assignee cannot do so, and that his petition, therefore, states no cause of action. At common law aliens could not take property by descent or other mere operation of law. *Farrell v. Enright*, 12 Cal. 450; *Lick v. Stockdale*, 18 Cal. 219.

We have now changed the rule of the common law in this respect by providing that "any person, whether citizen or alien, may take, hold, or dispose of property, real or personal, within this state." Section 671, Civil Code. We have also provided that the "Code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed, with a view to effect its objects and promote justice." Section 4, Civil Code. A non-resident alien may take property by succession, but he must appear and claim it within a given time. Section 672, Civil Code. This, as we held in *State v. Lyons*, supra, does not mean that he must nec-

essarily appear in person. The manifest object of the provisions of the Codes touching this matter was to give to non-resident aliens substantially the same rights to the property of a deceased relative as are secured to resident aliens by the constitution. And these provisions must be liberally construed to effect the object intended. Ordinarily, one who has property, whether it be tangible or a mere right of action, may sell it, and the purchaser will have and may assert the same rights to it that the seller had. A resident alien might sell his interest in the property of an estate, and the purchaser would be permitted to appear and take that interest. Why should not the non-resident alien and his assignee have the same rights in this respect as the resident alien and his assignee? The non-resident must "appear and claim" the property, but he does that whether his appearance be in person or by attorney, or by an assignee. To give to the word "appear" any other meaning would be evidence that we construe narrowly, and not liberally, the provisions of the Codes.

The judgment, we think, should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(87 Cal. 405)

HEDGES v. SUPERIOR COURT OF YUBA Co. (No. 9,721.)

Filed August 27, 1885

INJUNCTION—CONTEMPT FOR VIOLATION THEREOF.

In a contempt proceeding for violation of an injunction restraining the defendant corporation, and its agents and officers, from the commission of certain acts, the affidavit on which the contempt proceedings were based is sufficient, though it does not state that the defendants were the officers, agents, etc., of the corporation, if it does state that they had full knowledge of the issuance, service, and effect of the injunction, and that they violated the injunction by doing the acts complained of, and in contempt of the court.

In bank. Application for writ of prohibition.

Cross & Simonds, for petitioner.

E. A. Forbes, Stabler & Bayne, E. A. Davis, and I. S. Belcher, for respondent.

MYRICK, J. Application for a writ prohibiting the respondent from proceeding in the matter of an alleged contempt committed by the petitioners. An injunction had been issued and served, restraining a corporation, its officers, agents, superintendents, managers, servants, and employes, from the commission of certain acts. The affidavit on which the contempt proceedings were based did not, in terms, state that the petitioners herein were officers, agents, superintendents, managers, servants, or employes of the corporation; but it did state that they had full knowledge of the issuance, service, and effect of the injunction; that they worked the mine of the corporation; and that

they did the acts complained of in violation of the injunction; and in contempt of the authority of the court issuing it. We cannot presume, for the purposes of issuing the writ prayed for, that the petitioners went upon the ground of the corporation without its authority and committed a trespass, and worked its mine "with a high hand;" but, rather, that they went in and worked the mine with the consent and approbation of the owner; that their operations were permitted, if not approved and authorized. Tested by the rules of law as to a writ of prohibition, we think the affidavit sufficient. Writ denied.

We concur: MORRISON, C. J.; McKEE, J.; McKINSTRY, J.

(2 Cal. Unrep. 524)

JAMES and another v. FULKERTH. (No. 9,599.)

Filed August 27, 1885.

FRAUDULENT SALE OF CHATTELS—CHANGE OF POSSESSION.

A sale of chattels not accompanied by an immediate delivery, and actual and continued change of possession, is void as against creditors, and the chattels, the subject of the sale, may be seized on process by the sheriff.

Commissioners' decision.

Department 2. Appeal from superior court, Stanislaus county.

T. A. Caldwell, for appellant.

Louttit & Lindley, for respondent.

FOOTE, C. Action of claim and delivery for a herd of cattle. There was no conflict of evidence in the case; and it does not appear from it that there was such an immediate delivery and actual and continuous change of possession of the property in controversy, from the vendor to the vendees, as will satisfy the provisions of section 3440, Civil Code. The custody of the herd of cattle remained in the same person after as before the sale, and before they were seized in this action by the sheriff they had not been removed from the land of the vendor, where they were grazing when sold. We are therefore of opinion that the judgment and order of the court below should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(67 Cal. 319)

DUFOUR v. CENTRAL PAC. R. CO. (No. 9,803.)

Filed August 22, 1885.

1. NEGLIGENCE—REASONABLE CARE.

In an action for damages for injury caused by another, the plaintiff, to authorize a recovery, must have exercised that reasonable degree of care to avoid the injury which an ordinarily prudent person would have exercised under similar circumstances.

2. SAME—PROXIMATE CAUSE OF INJURY—LIABILITY.

Plaintiff, to recover for an injury caused by another's negligence, must make out a *prima facie* case in his own favor, showing that the damages resulted from the defendant's negligence; and if from the evidence it affirmatively appears that the plaintiff's want of due care was the proximate cause of the injury, he cannot recover; but if it merely appear that he contributed to the injury without being in fault in so doing, his right to recover is not affected.

3. SAME—CONTRIBUTORY NEGLIGENCE—WHAT CONSTITUTES—CASE STATED.

Where decedent was loading lumber on a car on a side track, and, before the lumber was secured, an engine ran up and coupled to the car, and moved it several hundred feet, acquiring a speed of five or six miles an hour, the decedent meanwhile standing on the ends of the lumber, when two heavy jerks of the car occurred, throwing decedent between the cars, where he was killed, it is held that the court could not say, as a question of law, that decedent was guilty of contributory negligence in not climbing to the top of the load of lumber, instead of maintaining his position on the ends while the car was in motion.

4. INSTRUCTIONS SUBSTANTIALLY GIVEN—REFUSAL NOT ERROR.

Refusal to give instructions which have already been substantially given is not error.

5. INSTRUCTION—CONSTRUCTION OF.

An instruction to the jury to "consider all the circumstances surrounding the case" is not erroneous, and cannot be construed to authorize them to consider matters not embraced in the evidence and pleadings.

Commissioners' decision.

Department 1. Appeal from superior court, Sacramento county.

S. C. Denson, for appellant.

N. Greene Curtis, S. Solon Hall, and F. H. Moore, for respondent.

SEARLS, C. Action by plaintiff, as the administratrix of her husband's estate, to recover damages from defendant, a corporation, for the death of her husband through the alleged negligence of its employees. Verdict for plaintiff. Defendant appeals from final judgment, and from an order denying a motion for a new trial.

Plaintiff's decedent was employed by the Friend & Terry Lumber Company to load lumber upon a car placed by defendant on a side track to receive its load. Decedent and another person were on this car loading lumber. Before the accident happened all the load of lumber had been placed on the car, but it had not been leveled off and secured in place so as to be fit for shipment. Decedent and his assistant were standing on the projecting ends of the longer timbers, at opposite ends of the car, leveling off the load and preparing to fasten the same in place, when the defendant's employees, without giving any notice, ran up with a locomotive engine, coupled onto the train in which the lumber car was standing, and commenced moving in a southerly direction, and had moved several hundred feet, and acquired a speed of five or six miles an hour, when two heavy jerks

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of the cars occurred, the latter of which threw decedent, from the ends of the lumber upon which he was standing, between the cars, where he was killed. The time consumed in passing from the starting point to where the accident occurred was from a minute to a minute and a half.

The defense of contributory negligence is set up, and appellant makes the point that the evidence was insufficient to justify the verdict. The position taken is that, conceding the negligence of defendant's servants in starting the train without notice while decedent was at work on the lumber, still the evidence shows that no injury was done him by this negligent start; that the shocks which afterwards occurred, and by which he was thrown from the train, were such as might reasonably be expected in a moving freight train; and that decedent ought to and could, by the exercise of common prudence, have reached a safe position on the car. John J. Dufour, a brother of decedent, who was working with him on the car, and who was the principal witness for plaintiff, after describing the manner in which they were engaged, says:

"There were about seven thousand or eight thousand feet of lumber on the car, which made the top of the lumber about six feet from the platform of the car, and about ten feet from the ground. My brother was standing on the north end of the car, and I on the south end. We were standing on the ends of the lumber, that projected at such a height that the top of the lumber was about even with our hips. While we were standing in that manner, smoothing the lumber preparatory for the cleats, the switch-engine hooked on, without any notice to us, and started out with us. That is the first knowledge I had that they would take us away at all. Then we stopped our work and held onto the ends of the lumber with our hands, to keep from falling off. There was a slight shock when they hooked on and started. That was the first intimation we had that they were moving, or were going to move. Then we went on down to the foot of N. street, and just as we crossed the street there were two heavy jerks. The first threw me backward, and I caught the end of a scantling, (the lumber was made up of everything,—long stuff and some short stuff.) Then immediately there was another shock, which threw my brother off, down between the cars."

Again he says:

"When the engine hooked on and started down we had no chance to get off. We could not get off without climbing on top."

The general rule is that, to authorize a recovery for damages occasioned by the negligence of another, the plaintiff must have exercised that reasonable degree of care to avoid the injury which an ordinarily prudent person would have exercised under like circumstances. Another rule in actions of this character is that it is incumbent upon the plaintiff to make out a *prima facie* case in his favor, showing that the damages claimed by him resulted from the negligence of the defendant. And where it affirmatively appears from his own evidence that the want of due prudence on his part was the proximate cause of the injury complained of, he cannot recover. The plaintiff's right to recover is not affected by his having contributed to his injury, unless he

was in *fault* in so doing. A plaintiff may not only contribute to, but even be himself the immediate cause of, his own injury, and yet recover damages therefor. If his share in the transaction was innocent and not incautious, it furnishes no excuse for defendant; as in a case where, by the negligence of a railroad company, the train was run into such danger that in order to escape from greater peril the plaintiff jumped off, and thus injured himself, he recovered damages against the company. Shear. & R. Neg. § 23. Where the negligence of plaintiff is relied upon to defeat his recovery, he must have been guilty of at least *ordinary* negligence. His failure to use *great* care will not defeat the action. Shear. & R. Neg. § 29. In the present case it was the duty of plaintiff's decedent to use such care and diligence in protecting himself from harm as would have been exercised by a man of ordinary prudence, placed in his position. It is claimed by defendant that he should have climbed upon the top of the lumber, where he would have been safe from the shocks incident to moving freight cars upon a side track, with which we may have supposed him to have been familiar. This is an assertion easily made, but it is not clear that it could have been readily and safely accomplished. The shocks spoken of, and which accompany the starting and stopping of a train, or altering its rate of speed, and with which decedent was familiar, may have rendered it both natural and necessary for him to do what he and his associate both did, viz., hold on to the timber. The jury may have concluded from the circumstances that such was the safest course to pursue. We cannot say, as a question of law, that decedent was guilty of contributory negligence in maintaining, as best he could, his position. The law can only define the duty of individuals under given circumstances. The existence of the circumstances is a question of fact for the jury. Under the instructions of the court as given, and the testimony before them, we are of opinion the jury was warranted in the verdict rendered.

Appellant takes exception to the use of the word "stop" in the sixth instruction given on request of plaintiff. The paragraph in which the word "stop" occurs proceeds upon the theory that "defendant, by its agents, carelessly and negligently caused the train of cars to move or start without giving any warning to deceased of its intention to move said cars, and did move or start or *stop* the same with such force or violence as to cause deceased to fall off. * * *

Under the pleadings and evidence the court was warranted in giving the instruction as asked.

The *gravamen* of the charge, as contained in the complaint, is that defendant, by its servants, negligently and carelessly, and without notice to deceased, did move its locomotive and cars so as "to back and move the same with great force and violence, * * *" and, "by reason of the great force and violence used in backing and moving said cars, and of the great shock occasioned thereby, and the failure and neglect of said defendant to give any warning or notice thereof, said de-

ceased was thrown from and off of said car. * * * Manifestly the complaint, taken together, charges that, by reason of the shock given to the car upon which decedent was at work, he was thrown off and killed. Whether the shock was produced by starting or stopping the train, by accelerating or checking its motion, is of little consequence, as the allegations are broad enough to authorize proof of the fact of stopping, as shown by the evidence, and the shock to the car occasioned thereby.

The refusal of the court to give the twelfth and seventeenth instructions as asked by defendant is assigned as error. These instructions had already been given in substance, and very nearly in the same form, at the request of defendant. The whole question of contributory negligence, so far as applicable to the case made, was clearly expounded to the jury, and to have repeated the same doctrine in synonymous language, or terms of like import, was unnecessary.

In defendant's reply brief, the point is for the first time urged that the seventh instruction given at the request of plaintiff is erroneous. The court had instructed the jury that in case they found for plaintiff they "must take into consideration all the circumstances *surrounding the case*." It is claimed the italicized words used imparted to the jury that they were at liberty to go outside of the case as made for circumstances upon which to predicate their verdict. The "circumstances surrounding a case" are such as are to be gleaned from the pleadings and evidence, and we must presume that it was to the circumstances appearing properly in the case, and not those outside of it, and of which the jury are not presumed to know, that the court alluded in this instruction, and that the jury so understood it.

We think the judgment of the court below, and the order denying the motion for a new trial, should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(2 Cal. Unrep. 512)

DAMSGUARD, Assignee, etc. v. GUNNOLDSON. (No. 9,718.)

Filed August 22, 1885.

1. FINDINGS REVIEWED, and *held* sustained by the evidence.

2. ERROR IN OVERRULING DEMURRER—SPECIFICATION OF.

Where no demurrer appears in the transcript, the overruling of the demurrer to the complaint, specified as error, will not be considered on appeal.

3. EVIDENCE—WRONGFUL ADMISSION WITHOUT PREJUDICE—EFFECT OF.

A reversal is not warranted by the admission without prejudice to the appellant of immaterial or incompetent evidence.

4. JUDGMENT AFFIRMED.

No error appearing in the record, judgment affirmed.

Commissioners' decision.

Department 2. Appeal from superior court, Placer county.

Jo. Hamilton and J. E. Prewett, for appellant.

J. M. Fulweiler and Hale & Craig, for respondent.

FOOTE, C. This is an appeal from a judgment, and from an order denying a motion for new trial. The plaintiff is the assignee of one Phillip Lang, who had been adjudged an insolvent, under the act of April 16, 1880, of the legislature of California. The assignee claimed, in the action brought by him against Gunnoldson, that the insolvent, Lang, in contemplation of insolvency, and with a view to defraud his creditors, had conveyed certain pieces of real property to Gunnoldson, and that Gunnoldson, upon application duly made for the restitution and possession of the property, had refused to either make a conveyance of it to the assignee, or to give him possession of the same, and that Gunnoldson had kept possession thus wrongfully of a certain saw-mill, and tract of land on which it stood, and had prevented, by his acts of pretended ownership, the assignee from getting possession of a large number of saw-logs lying and being on the mill tract of land, and sawing them up into lumber or otherwise utilizing them for the benefit of the insolvent's estate. He further charged in his complaint that by the wrongful and deceitful acts of Gunnoldson the estate of the insolvent in his hands for distribution had been damaged to the amount of several thousands of dollars. The defendant answered the complaint and denied specifically its allegations, and set up, by way of defense, the fact that he had a lien upon the mill tract of land for about \$900, with interest, and that although he had a deed to the land in the form of bargain and sale, he only claimed it to be a mortgage to secure his debt, and upon the issue thus made up the case went to trial, a jury being waived. A judgment was rendered in the court below for the plaintiff against the defendant for the sum of \$925, damages and costs; the defendant's mortgage was recognized as a lien upon the property to secure his debt and interest; and the plaintiff, subject to this lien, was declared to be the owner of the property set out in the deed to Gunnoldson from Lang. A motion for a new trial was made and denied, and this appeal was taken.

The specifications of the insufficiency of the evidence state, among other things, that the court found contrary to the evidence in its sixth, seventh, eighth, ninth, and tenth findings of fact. The main questions under those findings were: Had the defendant wrongfully and fraudulently withheld possession of the mill tract of land from the plaintiff, after due notice to yield its possession, and that of the saw-mill and logs and appurtenances? And, if so, whether, by these wrongful and fraudulent acts, the plaintiff had been kept out of possession of the mill, land, saw-logs, etc. And whether the defendant had thus caused damage to the estate of the insolvent in the hands of the assignee; and, if so, how much. It is plain that upon all these questions the evidence was conflicting, as a reference to the statement on motion for new trial—which is exceedingly full—

shows. The letter of the defendant of itself makes it evident that he refused to deliver possession of the premises demanded of him. The testimony of John Meyer, P. Lang, Mrs. Annie Lang, and J. Houser certainly went to prove the effort made by the defendant to induce the plaintiff to believe that he (the defendant) was the absolute owner of the land, and saw-mill standing on it, and would not yield the possession of them to him, perhaps with a view to a forced sale and the sacrifice of the saw-logs at such sale, which might in that event be bought by the defendant at a nominal price, perhaps with the view and hope that he might be permitted to hold on to the land and saw-mill as an owner in fee-simple.

The evidence tended to show that Gunnoldson wished to conceal from the plaintiff the exact nature of the deed from Lang of the property in question; for we have seen that he never explained in the first instance to Meyer, the plaintiff's agent, to what extent his title, and the conveyance he held, really went. Had Gunnoldson intended to deal fairly with the assignee, he would, at the first interview with the agent, not only have offered in plain terms to give up the property, cancel the deed he held, if paid the debt he held against it, but he would have explained without hesitation the whole connection he had with it. Instead of pursuing this course, he chose rather to act differently. He went to a lawyer and caused the letter which is in evidence to be written, in which he not only declares that he will not give up the land on which stood the saw-mill and lay the logs, but he even ridicules the pretensions of the assignee to demand it. The evidence makes manifest the fact that the saw-logs depreciated in value by reason of the plaintiff being unable to saw them up into lumber or otherwise utilize them, and that his efforts to do this in good faith were frustrated by those of the defendant, trying to induce the belief in the plaintiff that his title as assignee to the property was worthless and his own good. The plaintiff appears from the evidence to have done all that a prudent and honest man could, to recover possession of the land, saw-mill, and logs of timber, and to utilize them for the benefit of the insolvent's estate; and that he did not do so is entirely due to the conduct of the defendant, who sought to deceive him and embarrass his action, and succeeded in his efforts. And this deceitful conduct on the part of the defendant continued until the time had come when the saw-logs were practically worthless.

The evidence as to the quantity of the logs and their value was somewhat conflicting, but both quantity and value, as fixed by the court, were, we think, fair, taking all the testimony into consideration. The court allowed the plaintiff the value of the logs at the time when they could have been utilized for lumber or sold at \$1,700; that is, 425,000 feet of saw-logs, at four dollars per thousand. This was fair. It then reduced this amount by the sum of \$350, which the evidence showed it would have cost the plaintiff to put the saw-mill in repair

in order to saw up the logs, and by the sum of \$425, which was the value of the logs at the time when the defendant eschewed all claim to the land and mill, and first set up his mortgage claim only. That left the sum of \$925 as the actual damage the insolvent estate had suffered by the wrongful and fraudulent acts of the defendant, and for that sum of money and costs the court, as we think, was warranted, in view of all the evidence, in giving judgment in favor of the plaintiff. At best, the defendant can only claim that the evidence was conflicting, and that is not sufficient to overturn the findings of facts in a trial court.

The first specification of errors of law alleged by the defendant is that the court erred in overruling defendant's demurrer to the complaint. The transcript in the case does not disclose that any demurrer was ever filed or overruled in the case; hence, of course, this specification cannot be noticed here. As to the second specification, we think the facts clearly showed that the damages awarded by the court were legal and proper. So as to the third. As to the fourth specification, we think there was no error by the court. As to the fifth, the evidence alleged to have been improperly admitted was, we think, not incompetent, with a view of showing the diligence of plaintiff in endeavoring to utilize the saw-logs, and the difficulties that lay in the way of this desired action. As to the sixth exception, we think it proper to say that, even had it been incompetent, it could not have injured the defendant's cause, nor did it have that effect. As to the seventh exception, the ruling of the court was without error. As to the eighth specification, we think that, even if what followed the word "similar" in the answer of Lang to a question by the defendant's attorney was not strictly responsive to the question, and irrelevant, nevertheless, it could not have had, and did not have, any effect injurious to the defendant. In reference to the ninth specification, we are of opinion that the court rendered such a judgment upon the facts as found as was consistent with them.

For the court to have proceeded outside of the issues made by the pleadings, and ordered a sale of the premises under the mortgage held by the defendant, was not proper. The issue as to the mortgage matter, as made by the pleadings, was whether the conveyance of May 4, 1881, being on its face a deed in fee-simple, was, under the facts evidenced in the case, void *in toto* for fraud, or whether it was good as a mortgage and not void; and upon that issue, as made, the court found properly, in our opinion.

For these reasons we think the judgment of the court, as well as its order denying the motion for a new trial, ought to be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(67 Cal. 341)

WIXSON v. DEVINE. (No. 11,028.)

Filed August 22, 1885.

1. EVIDENCE—JUDGMENT ROLL, JUDGE'S OPINION NOT PART OF.

The opinion of the judge who tried a case is not part of the judgment roll, nor is it admissible in evidence as such.

2. PRIOR RECOVERY, CONCLUSIVENESS OF.

The record in a cause is conclusive only as to things material and traversable, and as to the truth of any allegations which were not material and traversable it is not conclusive. As to matter essential, and determined thereby, the judgment is conclusive between the same parties on the same matter, everywhere, as a plea in bar, or as evidence.

3. PRIOR RECOVERY BY PLAINTIFF—PLEADING—ESTOPPEL.

Where plaintiff sets up a prior recovery to certain issues raised by defendant's answer, it is not necessary nor proper for him to plead it, there being, under the California system of pleading, no replication to the answer; the prior judgment operates by way of estoppel to the defense set up by defendant.

Commissioners' decision.

Department 2. Appeal from superior court, Sierra county.

S. B. Davidson and *M. Farley*, for appellant.

Van Clief & Wehe, for respondent.

SEARLS, C. The action is brought for the alleged wrongful diversion of water, to the use of which plaintiff claimed the right, and for a perpetual injunction. Cause tried by a jury; verdict for defendant. Plaintiff moved for a new trial, which was denied, and the appeal is from final judgment, and order overruling motion for new trial. The record is wanting in clearness as to the precise time and point in the proceedings at which some of the objections were made and exceptions taken. It is not claimed for the two bills of exceptions set out in the statement on motion for new trial that they were served and settled as required by the Code, but that, having been prepared, they were included in the statement on the motion for a new trial; and it is as a part of such statement, and not as bills of exceptions, that they will be treated. At the trial plaintiff offered in evidence the judgment roll in *Wixson v. Devine and Wife*, and a paper purporting to be the opinion of the judge who tried the cause of which the judgment roll is the record, but which opinion was not signed by the judge, or in any way authenticated so as to entitle it to be received as evidence. The court admitted the judgment roll in evidence, and very properly excluded the so-called opinion of the judge. *Wilson v. Wilson*, 64 Cal. 92; *McClory v. McClory*, 38 Cal. 575; *Hidden v. Jordan*, 28 Cal. 305. After the judgment roll in *Wixson v. Devine* was in evidence, the defendant, under objection, introduced testimony tending to show that the water restrained by plaintiff's dam and claimed by the latter would, but for the dam, flow down a ravine, and, by percolation or by subterranean channel, find its way to a spring owned by the defendant, and claimed to be supplied by the water in question. Plaintiff moved to strike out this testimony, which was refused by the court, and the refusal is assigned as error.

The judgment roll shows that in June, 1883, J. S. Wixson, the

plaintiff, brought suit against Thomas Devine, the defendant in the case, and Honora Devine, his wife. The complaint avers plaintiff to be seized and possessed of a certain dam in Kentucky ravine, together with the usufructuary first right to the use of 25 inches of water of said ravine for irrigating, farming, culinary, and domestic purposes, and that the said waters, by means of a flume and ditch, are conducted to plaintiff's residence and there used, etc; that on or about April 21, 1883, Honora Devine, one of the defendants, tore away and removed the plaintiff's said dam, and diverted the said waters of said ravine from plaintiff's flume and ditch, and wholly prevented said 25 inches of water from flowing to plaintiff's residence, etc., whereby plaintiff was deprived of the use thereof, and his flume left to dry, etc., and claims damages in the sum of \$300. The complaint further avers a repetition of the alleged wrongful acts, shows the necessity of the water to plaintiff, and contains apt allegations as to the insolvency of defendants and the propriety of a temporary injunction, and prays for damages and a perpetual injunction. Defendants answered, denying that plaintiff ever was seized or possessed of, or entitled to, the possession of the dam described in the complaint, or that he was entitled to, or possessed or seized of, the usufructuary first right to any water of said ravine for any purpose. They admit plaintiff built a flume and ditch to divert said water from said ravine, but aver that he did so wrongfully, and had no right so to do. They deny breaking a dam, but admit removing obstructions from this ravine which prevented the natural and rightful flow of the waters, as they had a right to do. They further deny all damage to plaintiff. Defendants, after answering the allegations upon which a prayer for injunction is based, proceed to claim a prescriptive right to the water by an adverse use by themselves and grantors for 20 years.

As a further separate answer, the defendants claim ownership of all the water of Kentucky ravine, by virtue of a location and appropriation thereof in 1879, and of continuous use and possession since that date.

The cause was tried by the court without a jury, findings were waived, and on the eleventh day of September, 1883, judgment was rendered in favor of plaintiff and against defendants therein for one dollar damages, costs taxed at \$81.60, and granting a perpetual injunction restraining defendants from interfering with plaintiff's dam at the head of his flume, or his flume or ditch, "or from interfering with or turning out any waters from Kentucky ravine after said waters shall have reached plaintiff's dam, so long as the quantity shall not exceed 25 inches," etc.

The issue as to the right to have and use 25 inches of the water of Kentucky ravine was clearly made by the pleadings, and, as a result of the trial, plaintiff had judgment. The judgment was rendered upon the merits,—was between the parties to this action, and related to the same subject-matter. The right to use 25 inches of water from

Kentucky ravine was an element essential to a recovery by plaintiff in the former action. It was not a matter coming collaterally in question, or incidentally cognizable in the case, but formed the basis of his action. If such ownership or right to the water did not exist in plaintiff, he could not, under the pleadings, be entitled to recover. It was the very point in issue, and was determined in the cause. The dam described in the complaint, and which one of the defendants was charged with destroying, was but a means to an end; the water was the essential thing to be enjoyed, and the dam was but the instrumentality for securing it. Some stress seems to be laid upon the fact that the perpetual injunction forming a part of the final judgment only restrains defendants from interference with plaintiff's dam at the head of his flume, and with his flume and ditch, and "from interfering with or turning out any waters from Kentucky ravine, after said waters shall have reached plaintiff's dam, so long as the quantity reaching said dam shall not exceed 25 inches," etc. The prayer of the complaint, in that respect, was that defendants be restrained from interfering with the dam, or diverting the said waters therefrom, or from said flume or ditch. The relief awarded follows, substantially, the prayer, and is as broad as, technically considered, plaintiff was entitled to. We should, however, look beyond the injunction to the general scope and effect of the judgment.

The paramount object of the action, as gathered from the pleadings, was to determine the right to 25 inches of water of Kentucky ravine at plaintiff's dam or point of diversion, and the judgment in his favor for one dollar in damages could not properly be entered until the right was determined in his favor. If defendants were entitled to the water of Kentucky ravine, the dam of plaintiff, which prevented its flow, was an obstacle to their enjoyment; was a nuisance which they had a right to abate; and in the answer they substantially admit removing it, and claim the right so to do. There should be a limit to litigation. The same cause of action ought not to be brought twice to a final determination. Justice is promoted by having every cause once fairly and impartially tried; but, once so tried, justice is satisfied, and public tranquillity demands that all litigation of that question, and between those parties, should be closed forever. If error has crept into the proceedings, provision is made for correcting such error by an application for a rehearing, or by appeal. Failing in this, the best interests of society are promoted by treating the judgment as imparting absolute verity, and as conclusive between the parties and privies of every material question directly in issue, and necessary to the determination. Greenl. Ev. § 522. A record is not conclusive as to the truth of any allegations which were not material and traversable; but as to things material and traversable it is conclusive and final. And, as to questions thus essential and thus determined, the judgment is, as a plea in bar or as evidence, conclusive between the same parties, upon the same matter, everywhere.

A comparison of the judgment roll in the former cause with the pleadings in this satisfies us that the same identical question, viz., the right of plaintiff to have and divert 25 inches of water from Kentucky ravine, at his dam on said ravine, was a material question in issue, and essential to the determination of each of said causes; that such question was finally determined in the former cause, and should not again be litigated between the same parties. It was not necessary or proper for plaintiff to plead his former recovery. It operated by way of estoppel to the defense set up by the defendant, and, as we have in our system of pleadings no replication to the answer, the estoppel could not properly be pleaded. *Clink v. Thurston*, 47 Cal. 30; *Flandreau v. Downey*, 23 Cal. 358. The record of the judgment, introduced in evidence, precludes the defendant from setting up any right to 25 inches of water in Kentucky ravine at the point of plaintiff's diversion, or at any point above, so as to interfere with his enjoyment thereof at his dam and ditch. We are of opinion, therefore, that the testimony offered by defendant and objected to by plaintiff, and which he afterwards moved to strike out, was improper, as tending to open anew a question previously determined by a final judgment between the same parties, in a court of competent jurisdiction. If, however, on another trial, the plaintiff, under his complaint, shall claim a quantity of water in excess of 25 inches, measured as in said complaint prescribed, viz., under a four-inch pressure, as possibly under his pleading he may do, then and in that event the testimony offered will become competent in the determination of the right to such excess only.

The judgment and order should be reversed, and a new trial ordered.

We concur: FOOTE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

(2 Cal. Unrep. 516)

LEWIS, Ex'r, etc., v. ADAMS. (No. 9,979).¹

Filed August 24, 1885.

1. APPEAL—INTENDMENTS IN FAVOR OF ORDER GRANTING NEW TRIAL.

Every intendment is in favor of an order granting a new trial, and it must appear on appeal from the order that prejudicial error or abuse of discretion has been committed, or the order must be affirmed.

2. FOREIGN EXECUTRIX—RIGHT TO MAINTAIN ACTION.

A foreign executrix cannot maintain an action in the courts of California without first obtaining ancillary letters of administration, or testamentary.

3. STATUTE OF LIMITATIONS—FINDING ON ISSUE.

Where the statute of limitations is set up as a defense, a finding that "all the allegations of plaintiff's complaint are true" is not a finding as to the issue of the statute of limitations.

Department 1. Appeal from superior court, Los Angeles county.

¹ Reversed in banc. See 11 Pac. 333, 70 Cal. 403.

Victor Montgomery and Smith, Brown & Hutton, for appellant.
Thom & Stevens, for respondent.

MCKEE, J. Appeal from an order granting a new trial. It is axiomatic in law that on such an appeal the appellant must make it affirmatively appear that error, or abuse of discretion, has been committed in granting the order. Neither will be presumed. Every intendment is in favor of the order, and unless that is overcome by something in the record of the case upon which the order was made, or unless it has been made upon some proposition which, considered in itself, is prejudicially erroneous, the order must be affirmed. There is nothing in the record to overcome the presumption in favor of the correctness of the order. On the contrary, the record makes the presumption conclusive. The suit was on a judgment. From the original complaint it appears that the plaintiff was duly appointed by the probate court of Bexar county, in the state of Texas, executrix of the will of Nat. Lewis, deceased; and, in that capacity, she recovered in the district court of said county and state, on the fifteenth day of March, 1877, a judgment for \$12,942, and costs, against the defendant, P. T. Adams. On that alleged judgment the executrix brought suit in the superior court of Los Angeles county, in this state, against the said Adams, without first obtaining ancillary letters of administration. The suit was commenced on the fifteenth of February, 1882. On the eighth of July, 1884, more than five years after the date of the judgment, the plaintiff, by leave of the court, amended her complaint by inserting after the word "Adams," in the title of the cause, the names of Joseph Collins, John H. Kennedy, and James A. Dalyrample, and by striking out the word "defendant" wherever it occurs in the complaint, and inserting instead thereof the word "defendants;" thus alleging a judgment against P. T. Adams, Joseph Collins, John H. Kennedy, and James A. Dalyrample, jointly. Adams, by demurrer and answer, resisted recovery on the judgment, on the grounds of (1) incapacity of the plaintiff to sue; (2) *null tiel record*; (3) bar of the statute of limitations.

On the trial, the judgment record, given in evidence against defendant's exception, showed that the plaintiff, as executrix of the will of Nat. Lewis, deceased, on the fifteenth of March, 1877, in the district court of Bexar county, state of Texas, in an action against Adams, Collins & Co., on a partnership liability, recovered judgment for \$12,942, and costs, against P. T. Adams, Joseph Collins, James Dalyrample, and John H. Kennedy. Adams then proved that he had continuously resided in the state of California since July, 1877, except during a period of about two weeks, when he was absent from the state. On this evidence the court found, "All the allegations of the plaintiff's complaint, as amended, are true and correct;" did not find upon the issue of the statute of limitations; decided that the plaintiff was entitled to recover against defendant Adams the amount of the judgment, and entered judgment accordingly.

The decision and judgment were erroneous, because (1) the plaintiff, as a foreign executrix, could not maintain an action in the courts of this state without first obtaining ancillary letters of administration, or testamentary. Section 1913, Code Civil Proc., declares: " * * * That the authority of * * * an executor or administrator does not extend beyond the jurisdiction of the government under which he was invested with authority." The official character of the plaintiff was derived from the letters granted to her in the state of Texas, and as it was confined to the limits of the state it was not recognizable in California; therefore she could not, in that capacity, maintain an action here. If it became necessary for her to sue in this state to recover a debt due to the estate which she was administering in Texas, her first step was to obtain letters of administration from the proper court in this state, by subjecting herself to the regulations prescribed by the laws of the state. Otherwise, her official character cannot be recognized by the courts, and she has no capacity to sue in the courts of the state. (2) The court should have found on the issue of the statute of limitations.

The decision and judgment were therefore properly vacated. Order affirmed.

I concur: Ross, J.

McKINSTRY, J.: I concur in the judgment on the second ground stated in the opinion of Mr. Justice McKEE.

(67 Cal. 366)

GILMORE v. AMERICAN CENT. INS. CO. (No. 9,746.)

Filed August 25, 1885.

FINAL JUDGMENT—ENTRY IN PURSUANCE OF STIPULATION

Where a stipulation provided that the cause was to be stayed until final judgment and decision in another case, (the *Lycoming Case*,) and in case of an appeal to be stayed until determination of that appeal, and that, on final judgment in the *Lycoming Case*, either party to the present cause might cause to be entered without notice a judgment in this cause corresponding to said final judgment in the *Lycoming Case*, held, that the judgment in this case was properly entered when judgment was entered in the *Lycoming Case*, pursuant to a new trial, after appeal to the supreme court, if the time for moving for a new trial or appeal from the latter judgment had expired, and no such motion made or appeal taken.

Commissioners' decision.

Department 2. Appeal from superior court, Los Angeles county. *Gray & Haven, T. C. Van Ness, and W. P. Gardner*, for appellant. *Wells, Van Dyke & Lee*, for respondent.

BELCHER, C. C. This is the second appeal in this case. Upon the first appeal it was held that the judgment was prematurely entered, and it was therefore reversed. That judgment was entered upon the stipulation which is recited in the opinion of the court, (2 PAC. REP.

882,) and the judgment now appealed from was entered upon the same stipulation. It is now claimed that the stipulation had become *functus officio*, and did not authorize the entry.

It appears that the *Lycoming Case*, referred to in the stipulation, and this case had been commenced upon fire insurance policies which were issued by the defendant companies upon the same property, and were substantially alike. Demurrers had been interposed to the complaints and overruled, and answers filed. The cases were called for trial on the same day, and thereupon, "both parties consenting in open court that the issues in this cause are identical with those of the other action," the stipulation was made and entered in the minutes of the court. By the stipulation it was agreed that "all proceedings herein shall be stayed until final judgment and decision" in the *Lycoming Case*, "and in case of an appeal in said last-named action, then such proceedings are stayed until the final determination of such appeal; and upon such final determination, judgment, and decision" of the *Lycoming Case*, "either party, without notice, shall and may cause to be entered a judgment in this action corresponding to and like the said final judgment." The *Lycoming Case* was then tried, and judgment rendered in favor of the plaintiff. An appeal from that judgment was taken, and it was reversed, upon the ground that the demurrer to the complaint should have been sustained, because, a copy of the policy being attached to the complaint, the application therefor, which was referred to and made a part of the policy, was neither set forth in the complaint, nor its contents alleged. *Gilmore v. Lycoming Fire Ins. Co.* 55 Cal. 123.

On the going down of the *remittitur* the plaintiff amended her complaint by attaching thereto a copy of her application for the policy. The defendant amended its answer, but no substantial change was made in the issues to be tried. The case was then tried, and judgment was again rendered in favor of the plaintiff. After that judgment had become final, the defendant moved the court to change its ruling upon the demurrer in this case, and the motion was set down for hearing at a future day. Before the day arrived, the plaintiff, without notice, moved the court for judgment in pursuance of the stipulation, and her motion was granted. The appeal here is from that judgment, and an order refusing to set it aside. We see nothing in this of which the defendant can be heard to complain. When the stipulation was made, the cases were in every material respect alike. They were based upon like policies, involved the same amount of money, and had the same attorneys both for plaintiff and defendant. That being so, it was not thought necessary or advisable to go to the expense of trying both of them, as a final judgment in one would determine the real merits of the other. It was, however, contemplated that an appeal might be taken in the case tried, and that for the possible error in overruling the demurrer, or for other errors afterwards committed, the judgment might be reversed. It must

also have been contemplated that, in case of a reversal, amendments might be made and a new trial had. The stipulation in effect provided that while all this was being done in the *Lycoming Case*, and until a final judgment should be reached in that case, this case should remain in abeyance; but that when the judgment should become final in that case, then a like judgment might be entered, without notice, in this case.

The judgment appealed from in the *Lycoming Case* was not final, within the meaning of the stipulation, and the stipulation did not become *functus officio* when that judgment was reversed. Nor was it necessary to amend the complaint in this case as it was amended in that. The amendment was but a means to obtain a trial upon the merits, and the judgment thereafter obtained became final only, in the sense of the stipulation, when the time to move for a new trial and to appeal therefrom had elapsed and no motion was made and no appeal taken. Then the plaintiff became entitled to the judgment which she took in this case.

In our opinion the judgment and order should be affirmed.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(67 Cal. 364)

GREEHN and another v. MARKER. (Nos. 9,888, 11,059.)

Filed August 25, 1885.

MOTION FOR NEW TRIAL—DISMISSAL FOR WANT OF PROSECUTION.

A motion to set aside an order dismissing proceedings on motion for a new trial was properly denied where defendants, on May 26, 1884, filed a statement on motion for a new trial, which statement was not settled, allowed, or certified, and the court, on October 4, 1884, on motion of plaintiff, dismissed the proceedings on motion for a new trial for want of prosecution, and the motion to set aside this latter order was not made until December 3, 1884, and then without notice to plaintiff.

Commissioners' decision.

Department 1. Appeal from superior court, Lassen county.

John F. Alexander, for appellants.

E. V. Spencer, for respondents.

SEARLS, C. This is an action by plaintiffs, as copartners, for goods, wares, and merchandise sold and delivered to defendants. Plaintiffs had judgment. Defendant Marker moved for a new trial, and on the twenty-sixth day of May, 1884, filed with the clerk a statement on such motion. The statement thus filed was not settled, allowed, or certified, and on the fourth day of October, 1884, the court, on motion of plaintiffs, dismissed the proceedings on motion for a new trial, on the ground that said proceedings had not been prosecuted with due diligence, as required by law. Defendant Marker, on the third day of

December, 1884, moved the court to set aside the order of October 4, 1884, dismissing his proceedings for new trial, which motion was denied. Two appeals are prosecuted in the case: one from the final judgment, based on the judgment roll alone, and the other from the order of December 3d, denying the motion of defendants to vacate and set aside the order of the court of October 4, 1884, dismissing the proceedings for new trial. This last appeal was taken January 22, 1885, and by stipulation of counsel the two appeals are consolidated, and submitted as one case. No notice was given to counsel for plaintiffs of the motion to set aside the order of October 4, 1884, and one of the grounds specified in the order of refusal appealed from is the want of such notice. Under such circumstances the action of the court below was eminently proper, and any other course would have been erroneous.

Upon the question whether or not the order was an appealable one, we express no opinion. There is no error apparent in the judgment roll. We are therefore of opinion that the judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(67 Cal. 368)

COOK v. LION FIRE INS. CO. (No. 9,534.)

Filed August 26, 1885.

1. SALE—PRE-EXISTING DEBT AS CONSIDERATION—EFFECT OF.

Whether a sale of personal property based on the consideration of a pre-existing debt was absolute, or intended merely as a mortgage, is dependent on whether the intention of the parties was to cancel the debt or to secure it; and this is a question of fact which the acts of the parties, and negotiations at the time, will determine.

2. FIRE INSURANCE—REAL OWNER OF PROPERTY INSURED.

The contract, part of the subject-matter in suit, held to be an absolute sale, with the privilege on the part of vendee to repurchase, and the vendee, therefore, as the sole owner of the property sold, is not guilty of a breach of warranty in representing himself as such owner in an application for insurance.

3. SAME—STATEMENT IN PROOF OF LOSS.

In an action against an insurance company to recover the amount of a loss, the assured, if induced to execute a statement in proof of loss through false representations on the part of the company's adjuster, is not limited to the amount claimed therein.

4. FINDINGS—CONFLICT OF EVIDENCE.

Findings will not be disturbed on appeal where the evidence is conflicting.

Commissioners' decision.

Department 1. Appeal from superior court, county of Sacramento.

T. C. Van Ness, for appellant.

A. P. Catlin, for respondent.

FOOTE, C. This is an action upon a fire insurance policy. The evidence shows that just before the policy was issued, Cook, the plain-

tiff, had a debtor, one Cardwell; that Cardwell wanted to get some more money from Cook, and offered to sell him a certain 1,500 cords of wood in payment of the money which had been and was about to be procured by him; that as a part of this negotiation it was understood that Cook was to insure the wood to be transferred to him by Cardwell, and for that purpose these two visited one Meredith, who was the agent of the Liverpool, London & Globe Insurance Company, resident at Folsom. Upon stating to this agent the nature of the proposed sale, Cook was advised by him to take a bill of sale from Cardwell of the wood, and, further, to take possession of it, as the parties, Cook and Cardwell, seemed desirous that the transaction should be a sale and not a mortgage. Accordingly, a bill of sale was drawn by the agent, and signed by Cardwell, and a formal delivery of possession was taken by Cook, and the wood remained at the spot where he took such possession, on the bank of the American river, and he was never after that divested of its possession until it was burned. After this bill of sale and delivery of possession took place, and the agent, Meredith, was by Cook and Cardwell put in possession of a full knowledge of the title of Cook to the wood, and all the facts leading up to and surrounding this sale and delivery, he made out an application, addressed to the Liverpool, London & Globe Company, for an insurance policy on this property in the sum of \$4,000, and Cook signed the same. This application set out what was the understanding of the agent, Cook, and Cardwell at that time, viz., that Cook was the sole owner of the property. It was forwarded to San Francisco, and in due course of mail was received by the Liverpool, London & Globe Company's agent there. The risk was not accepted by that company, but it submitted the application to the Lion Company without any knowledge of it on the part of Cook, and upon this application, thus submitted, the Lion Company issued its policy to Cook, and it was forwarded through the Liverpool, London & Globe Company to Meredith, the latter company's agent at Folsom. Cook at that time was absent, and Meredith informed Cardwell of the arrival of the policy, and that the premium on it ought to be paid. Thereupon Cardwell paid to Meredith for Cook the amount of the premium for the Lion Company, which company received it. This wood was after that time burned, with 500 other cords of wood which Cook had bought from Cardwell, and which was piled near that first purchased. An adjuster was sent up to Folsom after the wood was destroyed by fire, to look into the matter. Neither he nor his company at this time seem to have claimed that the policy thus issued to Cook was void. Their claim appears to have been that he had only a lien upon the wood for the money he had paid Cardwell for it, viz., the sum of \$2,290; that he was not the sole owner of the wood; and that his insurable interest amounted, in no event, to more than the sum above stated. It also appeared that after the insurance policy was issued Cook took a second bill of sale from Cardwell, including the 1,500

cords of wood first sold and delivered, and the 500 last sold, and that at that time \$550 of the \$2,290 was paid Cardwell. It also appears in evidence that at the time of the first sale it was agreed in writing between Cook and Cardwell that the former would sell to the latter the 15,000 cords of wood if, by a certain date, Cardwell paid Cook the sum of \$1,800.

The whole contract in writing between Cook and Cardwell, comprised in both the bill of sale and the agreement contemporaneous with it, was a sale with the privilege to repurchase reserved to the vendor. It was simply in effect this: that Cardwell, upon paying to Cook within a certain time, and that but a brief one, a certain sum of money, might repurchase the property, or, what is the same thing, divest title from Cook, which had by the sale vested in him. *Haynie v. Robertson*, 58 Ala. 40, and cases there cited; *Hickman v. Cantrell*, 9 Yerg. 172; *Magee v. Catching*, 33 Miss. 673, 693. It was not a mortgage or a pledge. *Jones, Ch. Mortg. § 26*. In this case the transaction was based, it is true, upon a previously existing debt, and the question to be settled is whether the intention of the parties was to cancel that debt or secure it; and this, again, is a question of fact to be determined by the negotiations had at the time, and the subsequent acts of the parties. *Jones, Mortg. § 326*. Here a debt was paid, and no claim afterwards made for it. The party purchasing expressly declared that he would not take a mortgage, but must have a sale of the property to himself. A bill of sale was written and signed, and the property was delivered to the vendee by the seller, and taken possession of by him, and no acts of ownership have since been exercised by the vendor over it; he having the privilege conceded to him that if he would pay at a certain time a certain price for the property he might purchase it, and that was the full extent of his rights, and the title to the wood vested in Cook. *Jones, Mortg. § 326*; *Hoopes v. Bailey*, 28 Miss. 328. So that when Cook signed the application which was made out by Meredith, and described himself as the sole owner of the wood, he described his title truthfully, and committed no breach of warranty as to the policy issued by the Lion Insurance Company. The plaintiff did nothing, so far as the application was concerned, to forfeit the policy, even conceding that it was an application which the Lion Company might justly consider as made to itself.

But it is said Cook cannot recover from the Lion Company anything more than the amount claimed in the proof of loss, viz., the sum of \$2,290. This cannot be so. It sufficiently appears, although on this point the evidence is conflicting, that the insurance adjuster did not deal fairly with Cook in getting him to sign and swear to the proof of loss, and we do not think the latter should be bound by any such statement. When an adjuster faithfully and fairly obtains an affidavit of loss from one claiming against his company, it is to be commended; but when the contrary appears, as in this case, the party

thus entrapped should not be bound by it to his prejudice. The Lion Company was not deceived by Cook in any way; he stated nothing that affects his rights untruthfully to it or its agents, either verbally or in writing. He is shown to have been the sole owner of the property insured, to have suffered the full amount of the loss as such owner, and through no fault of his.

As to the point made, that the question asked Meredith, "what he knew of the transaction," as between Cook and Cardwell, was immaterial, we are of the opinion that it, and the evidence he gave in answer thereto, were admissible, because it was proper that all the negotiations had at the time the bill of sale was made, and also the subsequent acts of the parties in relation thereto, should be considered in determining the question of fact as to whether the intention of the parties was to cancel the debt or secure it. Jones, Mortg. § 326.

One of the main facts to be determined by the court who tried the case, a jury being waived, was whether the bill of sale represented an absolute sale of the wood, or was executed for security. This was a question to be decided by that tribunal on a preponderance of evidence, as if before a jury. *Perkins v. Eckert*, 55 Cal. 400-404. The court having determined this question in the affirmative, and a conflict of evidence on the point appearing to exist, the judgment should not be reversed.

Upon the whole case, we are of opinion that the judgment and order denying a new trial should be affirmed.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(67 Cal. 373)

CLANTON v. COWARD. (No. 11,026.)

Filed August 26, 1885.

1. EXCESSIVE VERDICT—POWER OF COURT AS TO.

Where a verdict is rendered in excess of the amount demanded by the complaint, the court may, before entry of the judgment, allow plaintiff to remit the excess and to take judgment for the amount demanded.

2. PROMISSORY NOTE—ACCOMMODATION MAKER—ACTION BY.

An accommodation maker of a promissory note, who signed as surety only, in an action to recover the amount paid by him to the payee, need not allege or prove that he paid the note at the request of the party for whose accommodation it was made. The law raises an implied promise on the part of such person to reimburse such maker paying the note, and suit brought is sufficient demand.

3. APPEAL—BILL OF EXCEPTIONS—AFFIDAVITS.

Affidavits not contained in the statement or bill of exceptions cannot be considered on appeal.

4. APPEAL—VERDICT—CONFLICT OF EVIDENCE.

A verdict will not be disturbed on appeal where there is a substantial conflict in the evidence on the points essential to recovery.

Commissioners' decision.

Department 2. Appeal from Superior court, county of Yolo.

H. Grant and R. Clark, for appellant.

Harding & Goin, for respondent.

SEARLS, C. Action on a promissory note made by plaintiff and defendant. Plaintiff had verdict and judgment. The promissory note in question was joint and several in form, and made by plaintiff and defendant to one A. D. Porter for \$4,500 and interest, which sum of money was borrowed from Porter, and used in the purchase of a marble-yard, the deed for which was taken in the name of defendant. Plaintiff and defendant were engaged as partners in buying and selling real estate in Yolo county, the former furnishing capital, and the latter rendering services in the business of the firm, keeping, or causing to be kept, the books of account of the partnership transactions. The theory of plaintiff is that the purchase of the marble-yard was an individual transaction on the part of defendant, having no connection with the partnership affairs, and that, in joining with defendant in making the note in suit, he did so merely to accommodate defendant, who received the money borrowed to his own use, and that he (plaintiff) having paid the note, he is entitled to recover the amount so paid, with interest. Defendant, on the other hand, contends that the purchase of the marble-yard was a partnership venture, and that the money was borrowed and used, and the note given, for partnership purposes. Plaintiff, in his complaint, demands judgment for the amount by him paid on the note, viz., \$4,650. The jury rendered a verdict in favor of plaintiff for \$4,972, being \$322 in excess of the sum demanded in the complaint. Plaintiff remitted the excess, and took judgment for the \$4,650. After the entry of judgment, defendant moved to set aside the verdict on the ground that it is not within the issues, is inconsistent with the same, and in excess of plaintiff's demand, which motion was denied, and the appeal is from final judgment, from an order denying a motion for a new trial, and from the order refusing to set aside the verdict.

The first point made by appellant is that "the verdict is not sustained by the evidence." There was a substantial conflict in the evidence on every point essential to a recovery, and upon principle, so well settled as not to require reference to the large number of cases in which the doctrine has been held, we are not at liberty to interfere with the verdict of the jury on that ground.

The second point is that "the court should have set aside the verdict on defendant's motion, because the same was outside of the issues made by the pleadings, and should have ordered an accounting." It appears in the record that plaintiff was permitted by the court to remit from the verdict the excess over and above the amount demanded in the complaint, and that this action was excepted to by appellant. We think the course pursued was not without warrant. The court may disregard the action of a jury in finding as to facts not put

in issue by the pleadings. *Pierce v. Schaden*, 62 Cal. 285. Had the judgment been entered for the amount of the verdict it would have been cause for granting a new trial, but even then the court might have denied the motion, on condition that plaintiff remit the excess. *Chapin v. Bourne*, 8 Cal. 294; *Harrison v. Peabody*, 34 Cal. 178; *Dreyfous v. Adams*, 48 Cal. 131; *Orr v. Hopkins*, 3 PAC. REP. 61. What the court could do in this respect on motion for new trial, it could do on motion of plaintiff before the entry of judgment. It was not necessary for the plaintiff to aver in his complaint or prove that he paid the note at the request of defendant. It is a sufficient answer to this to say that the complaint avers that the plaintiff signed the note as surety only, and for the accommodation of the defendant. By these words the request was sufficiently averred. Upon such payment being made, if the note was given as evidence of a debt due from defendant to the payee, the law casts a liability for repayment upon defendant, and raises an implied promise on his part to reimburse plaintiff, and suit brought was a sufficient demand.

The authorities cited by the learned counsel for appellant from 2 Greenl. Ev. §§ 113, 114, relate to cases where a party pays, lays out, and expends money for the benefit of another, without being legally bound so to do, in which cases a request must be averred. No order for an accounting was proper in the case. The answer is not framed with any such view, and defendant does not ask for an accounting therein. Defendant claimed the note to be a partnership liability. If correct in this, he was entitled to a verdict. But the jury found against him on the issue, as they did also on the defense of accord and satisfaction. The affidavit purporting to be that of G. W. Hutchins, foreman of the jury who tried the cause, cannot be considered, as it forms no part of the record, not having been embodied in any statement or bill of exceptions.

The judgment of the court below, and the orders denying the motion for new trial and refusing to set aside the verdict, should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(2 Cal. Unrep. 519)

PEOPLE v. MUNN. (No. 20,068.)

Filed August 26, 1885.

1. CRIMINAL LAW—REFUSAL TO GIVE INSTRUCTIONS NOT BASED ON EVIDENCE.

The refusal of a court to give instructions on the law of self-defense, and as to excusable homicide by accident or misfortune, in sudden combat, in a prosecution for murder, is not error, if there is no evidence on which to rest such a defense.

2. MURDER—EVIDENCE OF CHARACTER OF DECEASED.

In a prosecution for murder evidence is not admissible on the part of defendant as to the character of deceased for peace and quietness.

3. SAME—TESTIMONY OF MEDICAL EXPERT.

In prosecution for murder, where the theory of the prosecution is that a blow struck by defendant with his fist caused the death, testimony of the medical expert is admissible as to whether, in his opinion, a blow from a man's fist could have produced the fracture which caused the death of deceased.

In bank. Appeal from superior court, county of Stanislaus. On the trial of defendant for murder, his counsel asked the court to instruct the jury on the law of self-defense, and of excusable homicide by reason of accident or misfortune, upon sudden combat. The instruction was refused, because there was no evidence on which such defense could rest. Evidence offered by defendant as to the character of deceased for peace and quietness was also excluded. A medical gentleman was asked by the prosecution whether, in his opinion, a blow of a man's fist could have caused the fracture in decedent's skull. The witness answered that it was very probable.

Wright & Hazen, for appellant.

The Attorney General, for respondent.

By THE COURT. In this cause we have considered the points made on behalf of defendant, and find no error in the rulings of the court in regard to any one of them. Judgment and order affirmed.

(67 Cal. 378)

PEOPLE v. O'NEIL. (No. 20,073.)

Filed August 26, 1885.

1. HOMICIDE—DEGREES OF CRIME—INSTRUCTIONS.

On a trial for homicide, resulting in a conviction of murder in the first degree, an erroneous instruction as to whether a homicide, committed without deliberation, is murder in the second degree or manslaughter is not prejudicial to the defendant, and therefore no ground for reversal.

2. TRIAL FOR MURDER—DEFENDANT WITNESS IN HIS OWN BEHALF—INSTRUCTIONS.

The court, on a trial for murder, may instruct the jury that in giving effect to evidence of the defendant, where he testifies in his own behalf, they should consider the relation and situation under which he gives his evidence, the effect of the result of the trial on him, and the temptations which would influence his testimony, and the consequent weight to be given thereto.

3. NEW TRIAL—EVIDENCE OF INSANITY.

The evidence of defendant's insanity, which was the ground for the motion for a new trial, held insufficient.

In bank. Appeal from superior court, Sierra county.

M. Farley, for appellant.

The Attorney General, for respondent.

MORRISON, C. J. The defendant was tried and convicted of the crime of murder in the first degree, and sentenced to be hanged. The first point made on his behalf on the appeal is that the court erred in giving the jury the following instruction :

"The unlawful killing must be with the clear intent to take life, in order to constitute murder in the first degree. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation; for when there is a want of deliberation it is murder in the second degree."

The criticism on the foregoing instruction is on the latter part of it; that is to say, it is claimed that the court erred in telling the jury that "when there is a want of deliberation it is murder in the second degree," as the crime, under such circumstances, might amount to manslaughter only, and not to murder in the second degree. But conceding, for the purpose of the argument, that the instruction was erroneous in the concluding part of it, the defendant was not prejudiced thereby, as the verdict of the jury was for murder in the first degree. It matters not, therefore, in the present case, whether a homicide committed without deliberation is murder in the second degree or manslaughter only. *People v. Swift*, 5 PAC. REP. 505.

The next alleged error complained of is that the court erred in giving the following instruction :

"The defendant has offered himself as a witness on his own behalf on this trial, and in considering the weight and effect to be given his evidence, in addition to noticing his manner, and the probability of his statements, taken in connection with the evidence in the cause, you should consider his relation, and the situation under which he gives his testimony, the consequences to him from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which he is entitled. If convincing, and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it."

The foregoing instruction, or one to the same effect, has been considered and approved in several cases; one as early as *People v. Cronin*, 34 Cal. 195, and another as late as *People v. Morrow*, 60 Cal. 147. But, independent of any authoritative decision on the point, we think the instruction correct in principle. As was said by the court in the case of *People v. Morrow* :

"It is only by virtue of a provision of the Code that he [the defendant] is permitted to testify at all, and it is manifest that he labors under the strongest temptation to which any witness could be subjected." 60 Cal. 147.

There is but one other point in the case deserving of notice, and that is that the court should have granted a new trial on the ground of newly-discovered evidence. This alleged new evidence consists of letters written by the defendant since the homicide, and a letter written by the sheriff of Sierra county. It is claimed that this evidence

tends to establish the insanity of the defendant; and it is true that the defendant's letters are very incoherent, and the sheriff expresses the opinion that the defendant is not insane, but is of weak mind. We do not think that these letters by any means establish the insanity of the defendant, or that they constituted legal ground for granting him a new trial. No evidence was introduced on the trial tending to establish the insanity of the defendant, and that question was not properly before the court. The defendant was examined at great length as a witness in the case, and there is nothing in his evidence to indicate to the court that he was insane, or to make it the duty of the court to try the question of his sanity under section 1368 of the Penal Code.

Judgment and order affirmed.

We concur: MYRICK, J.; THORNTON, J.; MCKINSTY, J.; ROSS, J.

(2 Cal. Unrep. 529)

DORLAND v. BERNAL. (No. 7,204.)

Filed August 28, 1885.

REMITTITUR—MOTION TO RECALL TO CORRECT ERRORS.

A motion to recall a *remittitur* to enable an examination and correction of errors of the court below, since the *remittitur* went down, is not a proper way to reach such errors, and the motion will be denied.

Department 2. Motion to correct *remittitur* to the superior court, city and county of San Francisco.

Moses G. Cobb, for appellant.

Charles H. Parker, for respondent.

By THE COURT. This is a motion to recall a *remittitur*, to the end that the proceedings of the court below, had since the *remittitur* went down, may be examined, and certain alleged errors corrected. If any errors have been committed, the way now proposed by the mover is not the proper way for reaching them. Motion denied.

SUPREME COURT OF KANSAS.

(34 Kan. 61)

WILSON and others v. KISTLER.

Filed September 1, 1885.

PRACTICE—APPEAL—MOTION FOR NEW TRIAL—EXCEPTIONS.

Error from Mitchell county.

A. G. Mead and Holt & Hicks, for plaintiffs in error.*A. H. Ellis and Young & Scott*, for defendant in error.

PER CURIAM. Action by Joseph B. Kistler against Henry C. Wilson and George W. Jones, commenced May 14, 1883, to recover \$300, with interest from July 24, 1880, at the rate of 7 per cent. per annum. Trial had at the June term of the court for 1884. The jury returned a verdict on June 20, 1884, in favor of the plaintiff, for \$335.13; judgment rendered the same day, upon the verdict, in favor of the plaintiff. A motion for a new trial was filed by plaintiffs in error (defendants below) on June 23, 1884. The record does not show that this motion has ever been passed upon, or has ever been presented to the trial court for any action whatever. Defendants below (plaintiffs in error) have filed their petition in this court for a review and reversal of the judgment of the trial court. All of the alleged errors complained of in the briefs are those only which occurred upon the trial. As the motion for a new trial has never been overruled, or any exception taken to the action of the court concerning the motion for a new trial, the judgment of the district court must be affirmed, upon the authority of the following cases: *Ferguson v. Graves*, 12 Kan. 39; *Nesbit v. Hines*, 17 Kan. 316. With this conclusion, we deem it unnecessary to say anything regarding the motion to dismiss which has been filed by defendant in error, (plaintiff below.)

(34 Kan. 62)

PIPER and another v. THOMPSON, a Minor, etc., and others.

Filed September 2, 1885.

PRACTICE—BILL OF EXCEPTIONS—CASE MADE.

Error from Marshall county.

B. Giltner, for plaintiffs in error.*W. W. Guthrie and John A. Broughten*, for defendants in error.

PER CURIAM. This case is before us solely upon a bill of exceptions. There is no case made and no certified transcript. The certificate to the record is as follows:

The State of Kansas, Twelfth Judicial District, Marshall County—ss.: I, Joseph M. Patterson, clerk of the district court of the Twelfth judicial district of the state of Kansas, sitting within and for the county aforesaid, and custodian of the records thereof, hereby certify the above and foregoing to be a true, full, and complete copy of bill of exceptions in cause wherein E. D.

Thompson *et al.* are plaintiffs, and A. J. Piper and Helen E. Piper are defendants, in the therein entitled cause, as the same remains on file in my office.

Witness my hand, and the seal of said court, affixed at my office in Marysville, this, the fourth, day of April A. D. 1885.

GEORGE THOMAS,

Clerk of District Court.

[Seal.]

By N. B. CARDEN, Deputy.

Within the authority of *Whitney v. Harris*, 21 Kan. 96, and *Shumaker v. O'Brien*, 19 Kan. 476, the judgment must be affirmed.

SUPREME COURT OF UTAH.

(4 Utah, 206)

CUNNINGHAM v. UNION PAC. RY. CO.

Filed August 25, 1885.

1. EVIDENCE—DEMURRER TO—WHEN PROPER.

When there is a total defect of evidence as to any essential fact, the case should be withdrawn from the consideration of the jury. When, however, the evidence introduced has a legal tendency to make out a proper case in all its parts, it should be submitted to the jury, whose province it is to consider and determine its tendency and weight.

2. SAME—DISPLAY OF INJURED LIMB TO JURY IN ACTION UPON THE INJURY.

In an action for damages for injuries received through defendant's negligence, it is not error to permit the plaintiff to exhibit to the jury an injured limb.

3. MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT—DEFECTIVE MACHINERY.

Where it is the duty of the master to furnish sound material and machinery, and defective machinery causes an injury to the servant, the rule which exempts the master from liability for injury to a servant through the negligence of a fellow-servant does not apply.¹

4. ACTION FOR DAMAGES—NEGLIGENCE—GENERAL ALLEGATION—SCOPE OF PROOF.

Under a general allegation of negligence, the circumstances constituting it may be proved, even though other circumstances particularly specified in the complaint are unproven.

5. SAME—NEGLECT TO KEEP PREMISES IN REPAIR—PRESUMPTION FROM ACCIDENT.

Whenever it is a defendant's duty to keep premises in a proper condition as respects persons passing, and these are out of condition and an accident happens, it is incumbent upon the defendant to show that he used that degree of care and diligence which he was bound to use; and the absence of that care may fairly be presumed from the fact that there was the defect from which the accident had arisen.

6. CHARGE TO JURY—DISCRETION OF COURT AFTER EXHAUSTIVE INSTRUCTION.

When the charge given to the jury by the court covers the entire case, and submits it properly to the jury, the court may refuse to instruct further.

Appeal from Third district court.

Sheeks & Rawlins, for plaintiff.

Williams & Young, for defendant.

POWERS, J. The defendant and appellant is the owner of a coal mine in Summit county, known as the "Grass Creek Coal Mine," which it was working in February, 1882. On that date the plaintiff was in the defendant's employ as a coal miner, and in order for him to get to his work he was compelled to pass through a drift or gangway. The plaintiff claims that this drift or gangway was carelessly constructed by the defendant and that the defendant had negligently failed to secure the sides, roof, and pillars by timber or otherwise, and that it was unsafe, which fact was known to defendant. The defendant in its answer denies all this.

¹See *McGee v. Boston Cordage Co.* 1 N. E. Rep. 745, and note.

On the trial in the court below the plaintiff secured a verdict of \$5,000, and the case is brought here for review on appeal from the judgment. The testimony on the part of the plaintiff tended to show that the mine in question is run down upon an incline of 30 or 35 degrees. That after the incline runs down 200 feet the first level is reached, from which gangways extend east and west; 200 feet further down the second level is reached, with similar gangways. In February, 1882, the east gangway on the second level extended about 1,000 feet. Along this gangway are rooms which are numbered. The gangway is about 10 feet high and about 11 feet wide. Just previous to February, 1882, the plaintiff had been assigned to work as a miner in one of the rooms of the east gangway. The foreman gave him work to perform, and he was paid by the yard for mining the coal. On the last day of January plaintiff had completed his job, and on the evening of February 1st he went down for the double purpose of seeing his work measured and of obtaining a new job. Feeling tired from taking down some heavy drills, he sat down with two others to rest by the mouth of the room in which he had been at work, with his back against a pillar. A large quantity of coal fell on him from the pillar, which crushed his leg and badly injured his spine. The testimony also tended to show that if the gangway had been protected by timbers the accident would not have happened, and that the fact that it was dangerous could have been ascertained by the defendant. The plaintiff had no knowledge that the gangway was unsafe, and he testified that in coal mines the miners rely upon the company to make the gangway safe. It appears that the company was engaged in "robbing" the pillars that supported the roof; that is, taking coal from the pillars. The side of the mine where the plaintiff was working was undergoing what is called a "crush." The weight of the roof was crushing the pillars. It is usual to leave the pillars about one-half,—that is, the pillars are left the same size as the entrance between; but in this mine the pillars had been robbed until they were but little more than one-third.

The defendant claimed that everything had been done that was required to make the mine safe; that the mine had been managed with care, and fully inspected day by day.

1. The first point made by the learned counsel for the defendant is that the evidence is insufficient to justify the verdict; that no negligence was shown on the part of the defendant. There is evidence, as in the record, tending to show that if the walls had been timbered the accident would not have occurred, and that if the defendant had exercised reasonable diligence he would have discovered that the roof was unsafe. The accident occurred in a gangway, used as a highway in going to and from the workings of the mine, and as a place of resort for safety when blasts were made. The plaintiff had nothing to do with inspecting the gangway. The testimony on the part of the plaintiff shows that it was the duty of the defend-

ant to see that it was safe. The fact of the coal falling in the manner it did,—a thing not ordinarily happening, as the record shows, if reasonable diligence is employed in inspecting and keeping the gangway safe,—would raise a presumption of negligence on the part of the defendant. Whenever it is a defendant's duty to keep premises in a proper condition, as it respects persons passing, and these are out of condition, and an accident happens, it is incumbent upon the defendant to show that he used that reasonable care and diligence which he was bound to use; and the absence of that care may fairly be presumed from the fact that there was the defect from which the accident had arisen. *Kearney v. London B. & S. C. Ry. Co.* L. R. 5 Q. B. 411; L. R. 6 Q. B. 759; *Byrne v. Boadle*, 2 Hurl. & C. 722; *Gee v. Metropolitan Ry. Co.* L. R. 8 Q. B. 161; *Edgerton v. New York & H. R. Co.* 39 N. Y. 227; *Curtis v. Rochester & S. R. Co.* 18 N. Y. 534; *Mullen v. St. John*, 57 N. Y. 570; *Roberts v. Johnson*, 58 N. Y. 613; *Seybolt v. Railroad Co.* 47 Amer. Rep. 75; *Feital v. Railroad Co.* 12 Amer. Rep. 720; *Gray v. Boston Gas-light Co.* 19 Amer. Rep. 324.

But in this case there is evidence from which negligence upon the part of the defendant might be inferred. At least there was sufficient to submit to the jury. The coal which fell had been left overhanging the gangway some three feet. This the foreman of the mine knew, but he took no steps to remove it, or to protect it by timbers. He was aware that coal hanging from the roof, though it might seem safe one moment, was liable to fall the next. It was his business to report the condition of the mine from day to day to the superintendent, and it will be presumed that he did his duty. It was therefore proper for the jury, in view of all the facts, to find whether the defendant had been negligent or not. Under our system of jurisprudence it is the province of the jury to pass upon the facts. It is not only their privilege, but their right, to judge of the sufficiency of the evidence introduced, to establish any one or more facts in the case on trial. The credibility of the witnesses, the strength of their testimony, its tendency, and the proper weight to be given it are matters peculiarly within their province. The law has constituted them the proper tribunal for the determination of such questions. To take from them this right is but usurping a power not given. The jury should be left entirely free to act according to their own judgment. When there is a total defect of evidence as to any essential fact, or a spark,—a "*scintilla*," as it is termed,—the case should be withdrawn from the consideration of the jury. Where, however, the evidence introduced has a legal tendency to make out a proper case, in all its parts, then, although it may, in the opinion of the trial court, or the appellate court, be slightly inconclusive, and far from satisfactory, yet it should be submitted to the jury, whose proper province it is to consider and determine its tendency and weight. *Conely v. McDonald*, 40 Mich. 158; *Ryder v. Wombwell*, L. R. 4 Exch. 38; *Commissioners v. Clark*, 94 U. S. 284; *Schuchardt v. Allens*, 1 Wall. 369; *Drakely v. Gregg*,

8 Wall. 268; *Hickman v. Jones*, 9 Wall. 201; *Insurance Co. v. Rodel*, 95 U. S. 238; *Kelly v. Hendrie*, 26 Mich. 256; *Blackwood v. Brown*, 32 Mich. 107.

2. The next point made by the respondent is that the plaintiff was guilty of contributory negligence in sitting down where he did in the mine. It is conceded that he had a right to pass along the gangway in the ordinary course of business, but it is contended that he had no right to lounge there. It will be remembered that the plaintiff had come down into the mine for a double purpose,—*First*, to have his work measured; and, *second*, to secure a new job. He had reached the mouth of the room where he had been at work, and sat down to await the arrival of the foreman. He was there on legitimate business, and he had a right to sit down and wait. The gangway was supposed to be kept safe by the company. He was unaware of any defect in it, and we do not think such negligence was shown on his part as to bar his recovery. The most that can be said is that reasonable minds might differ as to whether he was negligent or not, and the question would therefore have to be determined by the jury.

3. The court below permitted the plaintiff to exhibit the injured foot to the jury, and this is alleged to be an error. While, of course, the trial court should be careful and not allow improper matters to be brought to the attention of the jury, the exhibition of the injured foot can hardly be called improper; for, as was said in the case of *Mulhado v. Railroad Co.* 30 N. Y. 370,—

"Such exhibition certainly tended to make the description of the injury more intelligible, and it cannot be supposed that it could have had any undue influence upon the feelings or sympathies of the jury. As well might it be contended that a man who had lost an arm or a leg by a similar injury should not be permitted to appear before a jury and testify in relation to it, lest thereby their feelings might be influenced, and, under the undue excitement created thereby, they might do injustice. We cannot assume that any such consequences will follow such a course of examination, and we cannot perceive that it was objectionable in the present instance." See Whart. Ev. § 346.

4. Another point made is that if negligence was the cause of the injury it was the negligence of the foreman, a fellow-servant of the plaintiff. The foreman had the entire charge and superintendence of the mine underground. Notice to him was notice to the company, and his neglect was the neglect of the company. *Brabbits v. Chicago, etc., Ry. Co.* 38 Wis. 289; *Malone v. Hathaway*, 64 N. Y. 5-9; *Mullan v. Philadelphia, etc., R. Co.* 78 Pa. St. 25; *Hofnagle v. New York Cent., etc., R. Co.* 55 N. Y. 608. The testimony shows that it was the duty of the defendant to keep the gangway safe; that the plaintiff had nothing to do with the gangway; and that he was unaware of the existence of the overhanging coal. It being the defendant's duty to exercise reasonable diligence in keeping the gangway in a safe condition, it could not absolve itself of that duty by delegating it to others. *Cooley, Torts*, 549, 557, 560; *Hough v. Railway Co.* 100

U. S. 213; *Corcoran v. Holbrook*, 59 N. Y. 517; *Holden v. Fitchburg R. Co.* 37 Amer. Rep. 343, 348, 349; *Indianapolis, etc., R. Co. v. Flanigan*, 77 Ill. 365; *Chicago & I. R. Co. v. Russell*, 83 Amer. Rep. 54. This point was very carefully considered by this court in the case of *Bowers v. Union Pac. R. Co.*, ante, 251, decided at the January term, 1885, and it was there held that when it is the duty of a master to furnish sound material and machinery, and defective machinery causes an injury to a servant, the rule which exempts the master from liability from injury to a servant, caused by the negligence of a fellow-servant, does not apply. The negligence is that of the company and not of a fellow-servant. The principle thus laid down applies with equal force to the case at bar. See, also, *Trask v. California S. R. Co.* 63 Cal. 96; *Beeson v. Green Mountain G. M. Co.* 57 Cal. 20. For the court, under the facts of this case, to have charged the jury, as requested by the defendant, that if the accident was occasioned by the negligence of the foreman the plaintiff could not recover, would have been error. *Chicago, M. & St. P. Ry. v. Ross*, 112 U. S. 377; S. C. 5 Sup. Ct. Rep. 184; *Moon's Adm'r v. Railroad Co.* 49 Amer. Rep. 401; *Railroad Co. v. Swanson*, Id. 718.

5. The plaintiff's complaint alleges that "the defendant so negligently and carelessly dug, constructed, and kept said gangway, by its negligent failure to timber or otherwise secure the sides, roof, walls, and pillars, or supports thereof, that the same was, at the time of the injury hereinafter mentioned, dangerous and unsafe, all of which the defendant then and there knew, and of which plaintiff was then and there ignorant." The defendant argues that, under this allegation, the court permitted the plaintiff to show that the cause of the accident was the stripping of the pillars, which so weakened the support that there was a general "crush" in that part of the mine which caused the injury. This testimony, the defendant claims, was improperly admitted under the pleadings. The answer to this is that if the plaintiff could show that the pillars were insufficient to support the weight upon them, then it became the duty of the defendant to do what a prudent man would do,—proceed to timber the walls and roof. Besides, under a general allegation of negligence, the circumstances constituting it may be proved, even though other circumstances particularly specified in the complaint are unproved. *Abb. Tr. Ev.* 583; *Edgerton v. New York & H. R. Co.* 39 N. Y. 227.

6. The case was properly left to the jury to determine, as a question of fact, whether or not the plaintiff was guilty of negligence, or whether the injury was caused by the negligence of the defendant. *Bowers v. Union Pac. R. Co.*, supra; *Davis v. Utah Southern R. Co.* 3 Utah, 218; S. C. 2 PAC. REP. 521; 2 Thomp. Neg. 1010-1012, 1015; *Railroad Co. v. Stout*, 17 Wall. 657; *Thurber v. Railroad Co.* 60 N. Y. 327; *Conroy v. Iron Works*, 62 Mo. 35; *Dorsey v. Phillips & C. Const. Co.* 42 Wis. 583; *Patterson v. Pittsburg & C. R. Co.* 76 Pa. St. 393, 394. The charge of the court covered the whole case so as

to fairly submit it to the jury, and therefore, although some of plaintiff's requests to charge were technically good law, it was not error to refuse to give them. *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291. When the charge given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to instruct further. It may use its own language and present the case in its own way. *U. S. v. Musser*, ante, 397, June term, Utah Sup. Ct. 1885.

We find no error in the record, and the judgment, therefore, must be affirmed, with costs.

ZANE, C. J., and BOREMAN, J., concur.

SUPREME COURT OF CALIFORNIA.

(2 Cal. Unrep. 525)

SMITH v. STROTHER, Auditor, etc. (No. 11,049.)

Filed August 27, 1885.

SHORT-HAND REPORTERS—CONSTITUTIONALITY OF ACT OF MARCH 21, 1885.

California act of March 21, 1885, relative to compensation of official short-hand reporters, considered, and *held*, that the act was not unconstitutional, nor a delegation of power to the judiciary of legislating in regard to the matter, nor in violation of the county government bill, requiring a uniformity in county governments, nor in violation of article 11, § 6, Const. Cal. *MRICK, J.*, dissents.

In bank. Appeal from superior court, city and county of San Francisco.

Wm. M. Pierson and *A. L. Hart*, for appellant.

John L. Love, for respondent.

Ross, J. The last legislature passed an act, approved March 21, 1885, entitled "An act to amend section 274 of an act entitled 'An act to establish a Civil Code of Procedure,' relative to the compensation of court reporters," by which it is provided that the official reporter shall receive as compensation for his services a monthly salary, to be fixed by the judge, by an order duly entered on the minutes of the court, which salary shall be paid out of the treasury of the county in the same manner and at the same time as the salaries of county officers, with a *proviso* to the effect that such salary shall not exceed \$300 per month in counties having a population of 100,000 and over, and shall not exceed \$275 per month in counties having a population less than 100,000 and exceeding 50,000, and so on to and including counties having a population less than 5,000, in which the maximum is fixed at \$75 per month. The act contains other provisions not important to mention, and further provides that "in civil cases, in which the testimony is taken down by the official reporter, each party shall pay a *per diem* of two dollars and fifty cents before judgment or verdict therein is entered, and where the testimony is transcribed the party or parties ordering it shall pay ten cents per folio for such transcription on delivery thereof; said *per diem* and transcription fees to be paid to the clerk of the court, and by him paid into the treasury of the county, and such portion as shall be paid by the prevailing party may be taxed as costs in the case."

The act is claimed to be violative of the constitution in three respects: *First*, as "a delegation of legislative power to the judiciary;" *second*, "in violation of the constitutional provision requiring a uniform system of county governments;" and, *third*, "because it imposes a new set of officials upon the people, in contravention of section 6 of article 11 of the constitution." Of course, we have nothing to do with the policy of the law, and it is our duty to sustain it, un-

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less we can see clearly that it is in conflict with the paramount law of the state. And this we cannot do. In so far as the right to confer upon the judges the power and duty of fixing the compensation of reporters is concerned, the provisions of the act in question are similar to those of all of the former statutes upon the subject, commencing with the act of May 17, 1861. St. 1861, p. 497. Immediately prior to the adoption of the Codes, the law with respect to phonographic reporters of the courts in San Francisco was contained in the act of March 13, 1866, (St. 1865-66, p. 232,) and in the act of March 28, 1868. Stat. 1867-68, p. 425. Each of those statutes, as well as the provisions of the Code of Civil Procedure, authorized the judge to fix the compensation of the reporter in certain cases. And in *Ex parte Reis*, 64 Cal. 234, it was said that whether the acts of 1866 and 1868 or the provisions of the Code were to control the determination of that case was immaterial, as "in either case, just before the adoption of the present constitution, the district court and county court could legally exercise the power of appointing a short-hand reporter, fix his compensation in criminal cases, and order such compensation to be paid, and it was the duty of the treasurer to pay the same upon the order of the court." It is true that the point now made was not made in *Ex parte Reis*, nor does the constitutionality of the various statutory provisions conferring upon the courts the power of fixing the compensation of reporters seem ever before to have been raised in this state. In our opinion, the point is not well taken. Phonographic reporters are officers of the court in the same sense that sheriffs and clerks are. They constitute part of the judicial system of the state. The court may fix the fees of referees, commissioners, keepers, etc., in proper cases. Why not of reporters? We see in the act of doing so none of the characteristics of *legislation*. Nor does it in any manner contravene that provision of the constitution requiring the legislature to establish "a uniform system of county governments." Phonographic reporters are not county officers, and have nothing to do with county governments. They are, as already said, officers of the courts, and constitute a part of the judicial system of the state. Nor does the act in question "impose a new set of officials upon the people, in contravention of section 6 of article 11 of the state constitution." The "officials" referred to in the act of March 21, 1885, were already provided for by law. See *Ex parte Reis*, 64 Cal. 233, and the statutes there and hereinbefore referred to. Section 6 of article 11 of the constitution, cited in support of this point of respondent, reads:

"Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns: which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns here-

tofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

The framers of the constitution, as we had occasion to say in *Staude v. Election Com'rs*, 61 Cal. 320, meant something when they inserted the provision that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws," and we are not at liberty to hold that they did not mean what they said. Giving, as they did, to all cities and towns, and cities and counties, the right to organize under a general act of incorporation, which the legislature was directed to pass, or to continue their existence under their existing charters, as they might elect, they nevertheless said that, whichever course should be pursued, such cities and towns, and cities and counties, should be subject to and controlled by general laws, —such general laws as should be passed by the legislature other than those for the "incorporation, organization, and classification" of cities and towns. The constitution has provided, in effect, that the city and county of San Francisco shall not be compelled to surrender its present charter for one it does not want; and, further, that its charter shall not be changed by special legislation directly, nor indirectly under the guise of laws relating to cities, or cities and counties, containing a population of more than 100,000 inhabitants. At the same time, recognizing the fact that the city and county of San Francisco remains a subdivision of the state, the constitution has said, in effect, that it, as well as all other cities and towns heretofore or hereafter organized, shall be subject to and controlled by such general laws as the legislature shall enact, other than those for the incorporation, organization, and classification, in proportion to population, of cities and towns.

Judgment reversed and cause remanded, with directions to the court below to overrule the demurrer.

We concur: THORNTON, J., MORRISON, C. J.

McKINSTRY, J., (*concurring*.) I concur in the judgment, and in the conclusion that the act of March 21, 1885, is valid and operative.

I dissent: MYRICK, J.

(2 Cal. Unrep. 522)

CAMPBELL and others v. JUDD and others. (No. 9,614.)

Filed August 26, 1885.

PETITION IN INSOLVENCY HELD SUFFICIENT.

Department 2. Appeal from superior court, Nevada county. The petition for insolvency mentioned in the opinion is as follows:

[Title of Court and Cause.]

To the Hon. John Caldwell, Superior Judge of said Court:

The petition of Wilcox & Powers & Co., (a copartnership,) Carton, McCarthy & Co., (a copartnership,) William Treloar, Theodore Wilhelm, and William Campbell, all residents and citizens of the state of California, respectfully shows that Jas. F. Judd and M. McDonough, copartners under the name and style of "J. F. Judd," are indebted to your petitioners as follows: To Wilcox, Powers & Co. in the sum of \$346, for goods delivered to them during 1883; to William Treloar in the sum of \$6.75, for goods delivered to them during 1883; to Theodore Wilhelm in the sum of \$22.95, for goods delivered to them during 1883; to William Campbell in the sum of \$251.40, for goods delivered to them in 1883; that all of said debts and demands accrued in this state. And your petitioners further represent that each of said sums are due and unpaid, and have not been assigned to your petitioners in whole or part; that said Jas. F. Judd and McDonough reside in said county, and have permitted their property to remain under attachment for over four days, and that they are insolvent, and have so been before and ever since said attachment was levied on their said property; that the said insolvents have no other property. Wherefore, your petitioners pray that this court issue an order to show cause, at a time and place fixed by this court, why the said J. F. Judd and M. McDonough should not be adjudged insolvents, and the surrender of their estates be made for the benefit of their creditors, in the manner required by insolvent debtors.

A. BURROWS,

Attorney for Petitioners.

[Duly verified.]

Chas. W. Kitts, for appellants.

A. Burrows, for respondents.

BY THE COURT. Conceding, without deciding, that the appellant has the right to prosecute this appeal, we are of opinion that the record is without error. The contention here is that the petition is defective. We have examined it, and are of opinion that it complies with the requirements of the statute, and is sufficient. Orders affirmed.

(67 Cal. 387)

MAULDIN v. Cox and another. (No. 9,610.)

Filed August 27, 1885.

1. **MARRIED WOMAN—ACTION BY, REGARDING HOMESTEAD PROPERTY—HUSBAND AS PARTY.**

Husband is not necessary party to action relating to married woman's right and claim to homestead property; and she is entitled to maintain an action in reference thereto at any time without joining her husband as party plaintiff.

2. **SAME—HOMESTEAD RIGHTS—STATUTE OF LIMITATIONS.**

The statute of limitations may be successfully invoked against a married woman, plaintiff, regarding her right or claim to homestead property, provided the facts establish an adverse possession in defendants as against her.

3. LANDLORD AND TENANT—ESTOPPEL TO DENY TITLE.

A tenant is estopped from denying his landlord's title.

4. HOMESTEAD—ADVERSE POSSESSION BY HUSBAND AGAINST WIFE.

A husband cannot, during coverture, and while he remains the head of a family, claim a homestead adversely to the wife.

5. SAME — ADVERSE POSSESSION MUST BE OPEN AND NOTORIOUS — STATUTE OF LIMITATIONS.

Adverse possession which will set the statute of limitations in motion must be open and notorious, as well as continuous. So, where a party held homestead property under recorded leases from plaintiff's husband, which leases had not expired, or if they had expired, had done so within a year, cannot acquire such a right as will set the statute of limitations in motion from a secret deed by said husband, which deed was unrecorded, and of which plaintiff had no notice; an entry under such a deed not being sufficiently open to give the owner notice of the hostile claim and possession.

Commissioners' decision.

Department 1. Appeal from superior court, county of Sacramento.
Hart & White, for appellant.

Grove L. Johnson and Thornton & Merzbach, for respondent.

SEARLS, C. Action of ejectment to recover a tract of land in Sacramento county. The cause was tried before a jury; verdict and judgment for plaintiff. Defendants moved for a new trial, which was denied, and the cause comes up on appeal from final judgment and order overruling motion for new trial. The facts necessary to a determination of the questions involved are as follows: In 1852, plaintiff, then a married woman and the wife of B. F. Mauldin, settled with her husband upon the land in question, where they continued to reside with their family until 1867. On the thirty-first day of August, 1860, a declaration of homestead in due form was executed by the plaintiff and her husband, jointly, covering the land, and which declaration, duly acknowledged, was recorded in the office of the county recorder of Sacramento county, October 15, 1860. On the tenth day of June, 1869, a patent from the state of California was issued to B. F. Mauldin, the plaintiff's husband. Patent recorded August 18, 1871. In 1867 plaintiff and her husband removed from the said premises, and took up their residence in the city of Sacramento, where they continued to reside until the tenth day of June, 1882, when B. F. Mauldin died. The sons of plaintiff and her husband remained upon the land about one year after their parents removed therefrom, and then left it, since which time none of the family have occupied the land, or any part thereof. On the twenty-seventh day of September, 1871, B. F. Mauldin executed a lease of the premises to defendants for a term of two years from February 8, 1872, rent reserved, \$400 for the term. The lease was duly acknowledged and recorded June 11, 1872. Before the expiration of the term, and on the eleventh day of June, 1872, said B. F. Mauldin executed and delivered to defendants a second lease of the same premises for a term of 10 years, from January 1, 1874, rent reserved, \$900 for term. Lease acknowledged and recorded June 11, 1872. On the twenty-fifth day of October, 1876, said B. F. Mauldin executed to defendants a deed of conveyance of all the

land in question, which deed was duly acknowledged and delivered by the grantor, but never recorded. Nominal consideration, \$2,500. The real consideration, as stated by defendant Clark, was \$1,500, made up, as nearly as we can determine from his testimony, as follows:

Rent reserved on 10-years lease, - - -	\$900
Interest, - - -	300
Cash paid at execution of deed, - - -	300
Total, - - -	\$1,500

On the twenty-second of January, 1880, said B. F. Mauldin executed and delivered to defendants a third lease of the same premises for a term of 10 years from date, rent reserved, \$1,000 for term. The lease was signed and acknowledged by defendants also, and duly recorded at request of defendant Clark, January 31, 1880. No consideration was actually paid therefor. The plaintiff herein was not a party to either or any of the leases, or to the deed of conveyance, and had no knowledge of the execution or existence of said deed until after the death of her husband in 1882. Defendants entered into possession under their first lease, and have ever since retained such possession, using the land for grazing and other purposes, of which possession by defendants plaintiff was cognizant.

This action was brought August 10, 1883. The *locus in quo* having been by the acts of plaintiff and her deceased husband dedicated as a homestead, and plaintiff not having joined in the leases or deed thereof, as provided for the conveyance of a homestead, it is not contended that she has lost her right thereto by any direct and affirmative act of her own. Defendants have pleaded the statute of limitations, and set up an adverse possession of more than five years, next before suit brought, under which they claim the right of plaintiff to recover is barred. It is provided by section 370, Code Civil Proc., that "when a married woman is a party, her husband must be joined with her; except when the action concerns her separate property, or her right or claim to the homestead property, she may sue alone." The action in this case clearly related to her right and claim to the homestead property; consequently the husband was not a necessary party, and plaintiff could at any time have maintained an action in reference thereto, without joining her husband as a party plaintiff. As to this property there was no existing disability by reason of coverture; hence it follows that the statute of limitations may be successfully invoked against plaintiff, provided the facts establish an adverse possession in defendants as against her. *Kapp v. Griffith*, 42 Cal. 408; *Wilson v. Wilson*, 36 Cal. 447. We are therefore led to an inquiry as to the sufficiency of the facts to constitute adverse possession in defendants against this plaintiff. Defendants entered into possession of the demanded property under lease from B. F. Mauldin of October 4, 1871, and continued as his tenants under that and the subsequent lease of 10 years, dated June 11, 1872, which took effect

January, 1874, until the execution and delivery by Mauldin of the deed of conveyance, dated October 25, 1876. As such tenants they were estopped from denying the title of their landlord during that period.

The fact that these leases were liable at any time to be avoided by the wife of Mauldin for want of capacity in her husband to make them upon the homestead does not alter the rule. The tenant is estopped, during his term, from denying the title of his landlord, not because the title is good, but because by accepting a lease and entering under it he has acknowledged the title to be in his lessor and is precluded from showing facts inconsistent with such acknowledgment. They were also estopped during the same term from claiming the homestead adversely to the wife of Mauldin, the plaintiff herein. It was held in *Frink v. Alsip*, 49 Cal. 103, that where the husband rents land from the owner and moves onto it with his family, in subordination to the owner's title, the wife cannot, during coverture, claim the premises adversely to the owner so as to set the statute of limitations in motion. In *First Nat. Bank of S. B. v. Guerra*, 61 Cal. 109, it was held that the wife could not claim during coverture adversely to the husband, or to those holding under him. We think the converse of the proposition is also true, and that during coverture, and while he remains the head of the family, the husband cannot claim the homestead adversely to the wife. As the head of the family he may select the place of residence. He may choose any reasonable place or mode of living, and the wife must conform thereto. Civil Code, § 156. He may remove his family from the homestead at will, subject only to the selection of a reasonable place of residence. He may manage and control the common property, and over the homestead may, with propriety, exercise acts of ownership which in another would be evidence of an adverse holding, but which in the husband indicate the assertion of the mutual rights of the parties to the marital relation. Section 370, Code Civil Proc., gives to a married woman a right to sue alone when the action is against her husband, or when her separate property, or her right or claim to the homestead, is concerned. No question is made as to her right to sue her husband where her right to the homestead is invaded. The remedy is given where her right is invaded, whether by the husband or a stranger. The question under discussion, however, is not has she a remedy, but may her right be invaded by an adverse holding on the part of the husband so as to render such remedy necessary?

It would seem more in harmony with our conception of the marital relation to say that while the husband remains the head of the family that, as to the homestead, his acts of possession and control will be taken as evidence of joint ownership with the wife, and that no presumption of an adverse holding can be indulged or allowed. If he may hold adversely to his wife, her right to the homestead can be determined without her consent, and in a manner different from

that contemplated by the Code. Her right to maintain an action against him, upon his claiming adversely, will result in gauging her title, not by the certain provisions of the Code, but by the more uncertain oral testimony of witnesses. The acts of the husband in controlling the property, in themselves innocent and proper, will be liable in after years to be tortured into evidence of an adverse holding where none was originally designed. All necessity for vigilance between husband and wife, in guarding their property rights, should be, as far as may be, avoided. Again, if the husband can hold the homestead adversely to the wife, then she may maintain ejectment for its recovery; but when restored to possession, her husband may at once rightfully remove her from the premises, or, if his adverse possession shall have ripened into a title which enables him to prevail in an action, he must continue to keep her out of possession, or she may again file a declaration of homestead on the same property, and start anew on the circuit of strife and litigation. For these and other reasons we conclude that during coverture, and while the husband remains the head of the family, neither party to the marital relation can hold the homestead adversely to the other.

There is nothing in the record to show that B. F. Mauldin ever claimed the homestead adversely to plaintiff; and, as defendants are estopped from claiming adversely against the former while holding under the lease, so they cannot claim during the same period against plaintiff, who was a joint owner with her husband of the title and property out of which their estate was carved, and into the possession of which they entered.

2. It is claimed by defendants that whatever their position as to plaintiff may have been prior to the deed from Mauldin of October 25, 1876, since the execution and delivery of that deed they have been in the adverse possession of the property, and as more than five years had elapsed between the delivery of the deed and suit brought, plaintiff's right is forever barred. An essential element of the adverse possession which will set the statute of limitations in motion is that it be open and notorious, as well as continuous; it must be of such a character as to operate as a notice to the holder of the true title that possession is held under a claim of right. The acts of the possessor should indicate clearly that he holds, not for the true owner or in subordination to his title, but for himself and in opposition to such owner. The acts should be such as, when proven or admitted, will establish an *ouster* of the owner. He must be entitled to maintain an action before the statute of limitations will run against him. He has a right also to be reasonably informed of the claim set up against him, either by acts or words, before the statute will run, and if the acts of the party in possession are of such a character as reasonably to indicate to the owner that the holding is not adverse, but in subordination, to the title, the statute will not return.

In the present case the defendants were in possession as tenants

under leases of record, and which would not expire until January 1, 1884. In 1880 another lease for 10 years from date, by Mauldin to defendants, executed and acknowledged by all the parties thereto, was placed of record. Plaintiff knew defendants were in possession of the premises. This was sufficient to put her upon inquiry; such inquiry, if pursued, showed that they went into possession as tenants of her husband, and in subordination to the title held by him jointly with herself. We must presume her to have known that under section 326, Code Civil Proc., the possession of the tenant is deemed the possession of the landlord, not only during the existence of the lease, but for five years after the termination of the tenancy. Of the absolute deed which her husband made to defendants, and which was never recorded, she knew nothing. Indeed, its existence seems to have been studiously concealed from her. To plaintiff, then, the possession of defendants naturally presented the idea of subordination to the right or claim held by her to the homestead. It was such in its inception; for aught she knew or could learn, it remained as such up to the death of her husband. The fact that the leases were void as against her avails nothing in favor of defendants. He who enters under a void lease is estopped equally with him who holds under a valid instrument. It is true, the defendants testify, in substance, that they only accepted the lease of January 20, 1880, at the urgent request of B. F. Mauldin; that they did not desire it; that they paid no rent, and did not enter into possession thereunder. We assume these statements to be true; but there are two answers: *First*. These facts were unknown to plaintiff. To her the case was only presented in the aspect of a new lease for a term of 10 years, executed by her husband and defendants upon the homestead. Under the facts, as then appeared to her, defendants could not set up an adverse title. *Second*. Placing out of view altogether the lease of 1880, and treating it as never having been made, we still find the lease of June 11, 1872, for 10 years, commencing January 1, 1874, and which consequently would not expire until January, 1884, and which leaves defendants as against plaintiff in no better position. They had, it is true, a secret conveyance of the property; but having been in possession under the lease, the plaintiff, having no notice of the deed, was not bound thereby. An entry to set the statute of limitations in motion must be sufficiently open and notorious to give the owner notice of the hostile claim and possession begun thereunder, and it must be hostile. The owner must have knowledge of the adverse entry, or such information as puts him upon inquiry. Sedg. & W. Tr. Title Land, § 780. "Such knowledge, or the means by which such knowledge may be attained, must be brought home to the person who was seized or possessed of the land, because the statute proceeds on the ground that he, knowing that a cause of action exists in his favor for the intrusion, yet acquiesces in it, and does not attempt to regain the possession of his land in the mode provided by law. A clandestine entry or posses-

sion will not set the statute in motion, because the owner of the land cannot be said to have acquiesced in the wrongful entry or possession. The owner will not be condemned to lose his land because he has failed to sue for its recovery when he had no notice that it was held or claimed adversely." *Thompson v. Pioche*, 44 Cal. 508.

These views are conclusive of the right of defendants to recover on their claim of adverse possession, and of the whole case. The instructions of the learned judge who tried the cause in the court below afford defendants no ground for complaint. The judgment and order denying a motion for new trial should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(67 Cal. 406)

EMPIRE GRAVEL MIN. CO. v. BONANZA GRAVEL MIN. CO. (No. 11,012.)

Filed August 28, 1885.

1. VERDICT—CONFLICTING EVIDENCE.

Where the evidence is conflicting in its substance, the verdict will not be disturbed on appeal.

2. TRESPASS—CONVERSION OF MINING PRODUCTS—MEASURE OF DAMAGES.

The measure of damages for an entry by defendant on plaintiff's mining property, and removal of gold-bearing earth, would be an amount of money such as would fully compensate plaintiff for all detriment proximately caused thereby.

3. SAME—COST OF WORKING MINING PRODUCTS, WHETHER CONSIDERED.

The measure of damages for the injury to a plaintiff's mining claim by wrongfully removing gold-bearing earth therefrom, where the *gravamen* of the action appears to be the injury done to the land by the acts of the defendant, will be the value of the gold produced, less the necessary expense of digging the gold-bearing earth and extracting the gold from it. But this rule cannot be extended so as to entitle a defendant who has committed a trespass to justify his act, and obtain a verdict, by showing the value of the property taken to be less than the expense of its severance from the realty; and to so instruct would be error. For every trespass on real property, the law presumes nominal damages, at least.

4. MOTION TO TAX COSTS—ORDER ON, WHETHER APPEALABLE.

A motion to tax costs is a special motion, that is, not a motion or proceeding as of course in the cause, and an order thereon is a special order, and, if made subsequent to the rendition and entry of final judgment, can only be reviewed in this court by a direct appeal therefrom.

Commissioners' decision.

Department 2. Appeal from superior court, Sierra county.

John Gale, for appellant.

Van Clief & Wehe, for respondent.

SEARLS, C. Action to recover damages for trespass upon a mining claim, and to obtain an injunction restraining defendant from the commission of like trespasses. Plaintiff had verdict and judgment for \$5,000, and costs taxed at \$1,344.45. Of the sum taxed as costs

\$926 was for expenses of a survey made under an order of the court upon application of plaintiff and for its benefit. Defendant moved for a new trial, which was denied, and the appeal is taken from final judgment and order denying motion for new trial. Appellant claims that the verdict is unsustained by the evidence, wholly inconsistent with the instructions of the court, and apparently given under the influence of prejudice and passion.

Plaintiff and defendant were the owners of adjoining mining claims, which were worked by drifting beneath the surface. Defendant had worked beyond its line, and upon the claim of plaintiff. The damage sustained by plaintiff thereby was the problem which the jury was required to solve. Those familiar with this character of mining will readily comprehend the difficulties in the way of determining the value of the material removed. The operations are mainly carried on through underground tunnels, drifts, and works, not open to inspection, and to which the public has no access. The pay-dirt, as it is termed, usually of limited quantity, is removed to the surface to be washed, and, in paying mines, being of large value compared with its bulk, is frequently washed by the owner, or some trusted agent, who alone can know with certainty the value of the proceeds. These and several other causes conspire to prevent the introduction, by the party injured in such cases, of testimony precise in character.

The most that can or should be demanded is to require such probative facts as best tend to illustrate and demonstrate the ultimate object in view. To the eye of the experienced miner, the appearance of the gravel with which he is entirely familiar may afford some indication of its value; its situation in the mine,—whether upon or off the channel, near or remote from the bedrock,—the value of ground adjoining or in close proximity, are circumstances which, with many others, are proper to be considered by a jury, and are frequently the best and only evidence within reach. If this class of circumstances, all converging on the very point at issue, tend to exaggerated results, it will generally be found that the party whose acts are complained of is possessed of all the necessary facilities for correcting the error. In the case at bar, there was a marked and substantial conflict in the testimony. Witnesses for defendant testified very positively to facts from which it would be reasonable to suppose the mining ground in question fell short of paying expenses; while, on the part of plaintiff, there was testimony tending to a state of facts in support of a larger verdict than was rendered by the jury. Whether the jury deemed it improbable that defendant would have continued for some months to work the ground of its neighbor at a heavy loss to itself, or by what particular process they reached their verdict, we need not speculate, provided always there was ample testimony in support thereof. With testimony thus conflicting, a jury composed, as we may well suppose, in part, at least, of miners was peculiarly qualified to deal, and we should not feel authorized to disturb their verdict merely because

upon the face of the record we might feel like coming to a different conclusion.

Appellant seems to lay some stress upon the fact that the instructions of the court were of such a character as to demand a different verdict. The only instruction asked by the plaintiff, so far as appears in the record, was to the effect that if the defendant entered upon plaintiff's claim, and dug and removed gold-bearing earth therefrom, the true measure of damages to plaintiff will be an amount of money which will fully compensate it for all detriment proximately caused thereby. The instruction embodies the rule laid down by our Civil Code as the measure of damages for breach of an obligation arising from contract. Civil Code, § 3300. No rule more favorable to the defendant could reasonably be asked. The instructions given at the request of defendant from 1 to 8, both inclusive, were quite as favorable as ought to have been given, and one of them, the fourth, was entirely too favorable. It was to the effect that if the jury found the necessary expense and cost of digging the gold-bearing earth, and of extracting the gold therefrom, equaled or exceeded the value of the gold dust extracted, they should find for the defendant.

We do not think the question of trespass or no trespass is to be determined on the basis of profit and loss. For every trespass upon real property the law presumes nominal damages. *Attwood v. Fricot*, 17 Cal. 38. The instruction under consideration was probably based upon the rule as laid down in *Maye v. Yappen*, 23 Cal. 306, in which the court says:

"The complaint in the case alleges that the defendants at divers times wrongfully entered upon a portion of plaintiff's mining claim, and extracted the gold and gold-bearing earth from a portion thereof, which gold and gold-bearing earth they wrongfully carried away and converted to their own use; and the value of the gold thus carried away is alleged to have been two thousand dollars. No demand of the possession of the gold, after it was separated from the earth, appears to have been made upon the defendants, and the *gravamen* of the action appears to be the injury done to the land itself by the acts of the defendants. The proper rule for damages in a case like the present is the value of the gold-bearing earth at the time it was separated from the surrounding soil and became a chattel. * * * In estimating these damages the expense of extracting the gold and separating it from the earth, after it is first moved from its original location, is to be deducted from the value of the gold taken out of the mining ground of the plaintiffs."

This decision was affirmed in *Hoffman v. Fett*, 39 Cal. 109. The complaint in this case is substantially the same as in *Maye v. Yappen*, and there is no disposition to question the doctrine enunciated in that case. The rule cannot, however, be extended so as to entitle a defendant who has committed a trespass to justify his act, and obtain a verdict, by showing the value of the property taken to be less than the expense of its severance from the realty.

There was no error in the admission of the affidavit and letters of Southerland in evidence. He was superintendent of the corporation

defendant, was a witness at the trial, had testified that he did not know he was working on plaintiff's ground, and that he did not order the tunnels to be caved to prevent a survey. The affidavit and letters tended, in some slight degree, to contradict his testimony, and to that extent, and for that purpose, were admissible.

Plaintiff filed a cost-bill in the case, including therein \$926 as costs and expenses of a survey made by plaintiff, and for its benefit, under an order of the court. Judgment in the cause was entered August 11, 1884. On the sixteenth day of August, 1884, defendant gave notice of a motion to tax the costs, on the ground that the items aggregating as above are not such necessary disbursements in the action as can be legally claimed as costs by plaintiff. On the fifteenth day of September, 1884, the court entered an order as follows: "Motion to tax costs denied. Ordered that the costs of the survey are necessary disbursements, and that the costs will stand as taxed;" which ruling is assigned as error.

It is objected on the part of plaintiff that the order of the court refusing to strike out items from the cost-bill, being a special order and made after the rendition and entry of final judgment, is an appealable order, and cannot, therefore, be reviewed except by a direct appeal therefrom. Code Civil Proc. § 956; *Calderwood v. Peyser*, 42 Cal. 112; *Clark v. Crane*, 57 Cal. 633; and *Dooly v. Norton*, 41 Cal. 441, are relied upon in support of the position taken. This court had previously held, in *Lasky v. Davis*, 33 Cal. 677, that an order made on a motion to retax costs is not appealable. It is not an order made after final judgment, within the meaning of section 343 of the practice act, even though it be made after the entry of judgment; for in legal effect the order, if the motion is granted, amounts to a modification or amendment of the judgment, or, in other words, becomes a part of it. If the motion is denied, the error is none the less in the judgment, and can be reviewed only upon an appeal from the judgment. Costs are included in, and constitute a part of, the judgment; and hence, though ascertained and adjudged by the court after an entry of judgment by the clerk has been made, yet the law considers such action of the court as having preceded the final judgment. In *Dooly v. Norton*, 41 Cal. 441, the court reviews the previous cases on the subject, and holds that an order made on motion to retax the costs in an action is a proper subject for review in some mode in this court. If made before the judgment is rendered, it may be reached by an appeal from the judgments; but if made after the entry of judgment, it is an order after final judgment, from which, as a special order, an appeal will lie; thus virtually overruling *Lasky v. Davis*. The reasoning in *Calderwood v. Peyser*, 42 Cal. 112, and *Clark v. Crane*, 57 Cal. 633, is in line with *Dooly v. Norton*. The case of *Flubacher v. Kelly*, 49 Cal. 116, though referring to *Lasky v. Davis* with seeming approval, was really a case in which the motion to strike out a cost-bill was made before the entry of judgment, and, under all the cases,

could only be reviewed by an appeal therefrom. A motion to tax a cost-bill is a special motion,—that is, not a proceeding as of course in the cause,—and an order thereon is a special order, and, if made subsequent to the rendition and entry of final judgment, can only be reviewed in this court by a direct appeal therefrom. This rule is in harmony with the letter and spirit of the Code of Civil Procedure. In appeals from final judgments the statement or bill of exceptions may be framed so as to include a review of all orders prior to the entry of judgment, but as to orders made subsequent to judgment, and which may, and usually will, require a special statement, and that, too, frequently after the time for statement on appeal has expired, the inconvenience in practice of treating them as included in the appeal from final judgment will be found a serious objection, to say nothing of trenching upon the true intent of the Code.

We think the objection of respondent to considering the question arising on the cost-bill well taken. The judgment of the court below, and the order denying defendant's motion for a new trial, should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(67 Cal. 429)

EEL RIVER & E. R. Co. v. FIELD. (No. 11,052.)

Filed August 28, 1885.

1. RAILROADS—LOCATION OF LINE—CHANGE OF ROUTE.

Under the statute of California (Civil Code, § 466) a railroad company, even after it has once finally located its line and filed the map required by law, may, if it appears that the location can be improved thereby, alter or change the route, and may proceed, in the same manner as the original location was acquired, to acquire and take possession of such new line, being required to sell or relinquish the lands owned by them for the original location within five years after such change.

2. SAME—NECESSITY AS AN ELEMENT IN TAKING LAND.

Mere fact that a railroad, after its preliminary survey, acquired a right of way over another portion of land of defendant in condemnation proceedings, over which it might, though at less advantage, build its road, does not render the taking unnecessary, as the railroad company may, under the statute of California, alter or change its road whenever the location can be improved.

3. FINDINGS—EVIDENCE.

Findings held not sustained by the evidence.

In Bank. Appeal from superior court, Humboldt county.

S. M. Buck, for appellant.

W. H. Brumfield, for respondent.

Ross, J. The plaintiff, a corporation organized under the laws of this state for the purpose of building and operating a railroad from a point on the Van Duzen river to the city of Eureka, in Humboldt

county, seeks by this proceeding to condemn a right of way for its road over the land of defendant. The answer of defendant put in issue the alleged necessity for taking the land in question, and upon this issue the court below found in favor of defendant, and accordingly gave judgment against the plaintiff. It is contended here that the evidence is insufficient to sustain the finding.

It appears that one R. F. Herrick, at the instance of the plaintiff, made a preliminary survey for the line of its road through that portion of the land of the defendant described as "west of the dyke," and defendant sold to the plaintiff a right of way, four rods in width, for its road over that part of his land, "granting to said company the right to pass and repass with its rolling stock, freight and passenger cars, to construct and maintain side tracks, switches, turn-tables, and warehouses; the said grant of right of way to continue and be in force so long as the said company shall continue to maintain and operate its road, and no longer." But the line of the road, as finally located, ran through another portion of defendant's land, and it is over that portion of the land embraced in the line as finally located that the plaintiff seeks to acquire the right of way by means of these condemnation proceedings. The plaintiff's engineer testified at the trial that—

"It was necessary to locate the line, as described in the complaint herein, across the defendant's land, because it is the best line, the most economical to construct, and the most practicable route for running a line through that land. It is the shortest line. It has less curvature than any other line, and the road being a very important one, (may be a through line,) it is necessary to consider very carefully the best line to be run through defendant's land."

The engineer who ran the preliminary line testified:

"The difference between the line described in the complaint and the one I surveyed consisted in this: The one I surveyed west of the dyke was of greater length, had a very short curve; there may be considerable difference in cost of two routes, as the line in the complaint described is high enough to avoid the necessity of throwing up an embankment. I could not say what the difference in cost would be. The route they have located is the shortest; still the other route would accommodate their business, and it looks to me better than the one they seek now. It is nearer their landing."

The testimony of the witness F. E. Herrick is of but little consequence, as he admitted that he had made no survey of the routes, but that his examination was confined to the map, and his experience in railroad building was confined to two logging roads,—one a quarter of a mile, and the other one mile, in length. The basis of the action of the court below in finding that the land in question was not necessary to be taken for the purposes of the road was the fact that the plaintiff had previously acquired, and still held, by purchase, a right of way across defendant's land west of the dyke, "which will enable the plaintiff to accomplish the object for which it is incorporated and discharge every duty it owes to the public." By section 465 of the Civil Code it is declared that—

"Every railroad corporation has power (1) to cause such examination and surveys to be made as may be necessary to the selection of the most advantageous route for the railroad; and for such purposes their officers, agents, and employes may enter upon the lands or waters of any person subject to liability for all damages which they do thereto. * * * (4) To lay out its road, not exceeding nine rods wide, and to construct and maintain the same, with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same. * * * (7) To purchase lands * * * to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in title 7, part 3, Code of Civil Procedure, for the condemnation of lands; and to change the line of its road, in whole or in part, whenever a majority of the directors so determine, as provided hereinafter; but no such change must vary the general route of such road, as contemplated in its articles of incorporation. * * *"

The next section provides:

"Every railroad corporation in this state must, within a reasonable time after its road is finally located, cause to be made a map and profile thereof, and of the land required for the use thereof, and the boundaries of the several counties through which the road may run, and file the same in the office of the secretary of state," etc.

By section 467 it is provided:

"If, at any time after the location of the line of the railroad and the filing of the maps and profiles thereof, as provided in the preceding section, it appears that the location can be improved, the directors may, as provided in subdivision 7, section 465, alter or change the same, and cause new maps and profiles to be filed, showing such changes, in the same offices where the originals are of file, and may proceed, in the same manner as the original location was acquired, to acquire and take possession of such new line, and must sell or relinquish the lands owned by them for the original location within five years after such change. No new location as herein provided must be so run as to avoid any points named in their articles of incorporation."

It will be observed that by the provisions of the last section that, even after the line is once finally located and the map filed as required by section 466, if it appears that the location can be improved, the directors may, in accordance with the provisions cited, alter or change the route, and may proceed, in the same manner as the original location was acquired, to acquire and take possession of such new line, being required to sell or relinquish the lands owned by them for the original location within five years after such change. But here the effort is to condemn land embraced within the line as first finally located, and as shown by the map filed by the plaintiff, in accordance with the provisions of section 466 of the Civil Code. There is no substantial conflict in the evidence upon the proposition that the line as finally located, and within which the land sought to be taken falls, is the shortest, best, and most economical, and therefore the most practicable, route. The mere fact that the plaintiff had, after its preliminary survey, acquired a right of way over another portion of defendant's land over which it might, though at less advantage, build its road, does not render the taking unnecessary; for, as has been seen, railroads are, under our statute, empowered to alter or change their

route, even when once finally located, whenever the location can be improved. In the present case the right of way granted the plaintiff by defendant was conditional, and, by the terms of the deed, will cease to exist when plaintiff's road is constructed elsewhere.

We are of opinion that the evidence is insufficient to sustain the finding of the court below. Judgment and order reversed, and cause remanded for a new trial.

We concur: MYRICK, J.; MORRISON, C. J.; THORNTON, J.; MCKEE, J.; MCKINSTRY, J.

(67 Cal. 438)

WENZEL v. COMMERCIAL INS. CO. OF CALIFORNIA. (No. 9,865.)

Filed August 29, 1885.

1. FIRE INSURANCE—FALSE REPRESENTATION OF VALUE.

When an insurance policy provides that any false representation by the assured of the value of premises shall avoid the policy, whether a false representation of value, though not made fraudulently, will affect the validity of the contract, *quære*.

2. SAME—CONDITION IN POLICY FOR WATCHMAN.

Where a policy is conditioned that it shall be void unless a watchman is kept on the premises during such time as the mill is idle, the employment of a person called a watchman to watch and guard the premises during the time the mill is idle is not a compliance with the condition, if such person is, during several hours of the day, working in a mine 2,200 feet away from the mill, and during the night sleeps in a house 900 feet therefrom, and out of view of the premises by reason of a hill. A watchman of a building, in this sense, is a sentinel,—one who takes care of it during the night-time.

3. SAME—BREACH OF CONDITION AGAINST ASSIGNMENT.

A breach of condition that the insured shall not assign or change possession of the property without the insurer's consent, by a lease of the same will avoid the policy.

4. SAME—BREACH OF CONDITIONS IN POLICY.

A breach of any one of several conditions in a policy, if so provided, will avoid the policy, and be fatal to recovery.

Department 2. Appeal from superior court, Tuolumne county.

R. B. Wallace, for appellant.

Cable Dorsey and Dorsey & Nichol, for respondent.

MORRISON, C. J. This is an action on a policy of insurance, issued by defendant to plaintiff on the seventh day of October, 1881, by the terms of which, in consideration of a certain premium paid the former by the latter, defendant insured the plaintiff for the term of one year, on his certain quartz-mill, situated in the county of Tuolumne, and on other property in the policy enumerated, against loss by fire. Among the conditions contained in the policy are the following:

"It is understood and agreed that a watchman shall be employed by the assured to guard the premises during such time as the mill is idle. * * * Any false representation by the assured of the condition of the property, * * * or any overvaluation thereof, * * * or any false or fraudulent representation to the authorities touching the property hereby insured, * * * or any change in the possession without the written assent of the company, shall render the policy void."

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These are the important conditions affecting the policy which it is material to consider in this case, and all of which, it is claimed by the company, have been violated and disregarded by the plaintiff. The mill was destroyed by fire on the second day of August, 1882, and within the time covered by the policy of insurance. The company refused to pay the loss incurred, and this action was brought to recover the same of the company. Plaintiff had judgment in the court below. Appellant moved for a new trial, which was denied by the court, and the appeal is from the judgment, as well as the order denying the motion for a new trial.

At the time of his application for insurance, the plaintiff represented to one Deickman, the agent of the company, that the property covered by the policy was of the value of \$12,000, and the defendant, believing such representation to be true, insured the property on the basis of a valuation thereof at \$12,000. This is the fourth finding of the court. The court further finds, in the same finding, that the property was of no greater value than between eight and nine thousand dollars; but the plaintiff did not intentionally deceive Deickman, the agent of the defendant, but, on the contrary, the plaintiff estimated the property at its cost, which was the sum of \$12,000. How far did this false representation of value, although not made fraudulently, affect the validity of the contract? Was it a breach of a condition of the policy? Another important fact in the case appears clearly from the evidence that the insured reported to the authorities, in giving in this property for assessment, that its value was only \$500, and on that amount only he paid taxes on the property for the fiscal year 1881 and 1882. Another point made on behalf of the defense is that the policy contained a condition to the effect that a watchman should be employed by the insured to guard the premises during such time as the mill should be idle. Was that condition kept and observed by the plaintiff? The sixth finding is—

"That during the space of five weeks, immediately prior to the sixteenth day of October, 1881, said quartz-mill was continuously in operation, crushing ore from the Lynch quartz mine; that thereafter said mill was idle until June, 1882; that it was idle from on or about the first day of July, 1882, to the second of August, 1882, at which time said mill was destroyed by fire, and that it was idle at the time of its destruction."

By the thirteenth finding the court finds that one Lynch was employed to watch and guard the mill, and appellant's counsel makes the point that this is not a finding that Lynch was employed as a *watchman* of the premises. However this may be, it is apparent from the uncontradicted evidence in the case that Lynch was not employed as a watchman of the premises, within the sense and meaning of the contract. It appears that Lynch was working in his own mine, 2,200 feet distant from the mill, for six or seven hours during the day, and that at night he slept in a house 900 feet from the mill, between which house and the mill a hill intervened, which prevented this so-

called watchman from seeing the mill. The mill was burned and destroyed without waking Lynch, and the first intimation he had of the destruction of the property was in the morning after the fire. He was too far away from the property during the hours of the night, when it most required watching, to be of any use whatever as a watchman of the premises. A watchman, according to Webster, is a sentinel; and a watchman of a building is one who takes care of it during the night-time. There are other reasons apparent from the evidence in the case for holding that the conditions of the contract for a watchman on the premises were not kept by the insured, but we have confined ourselves to the *undisputed* facts of the case.

Another point made by the appellant is that the condition of the policy in regard to a change in the possession of the property was broken by the insured. In the ninth finding it was found by the court as a fact in the case that on the seventeenth day of January, 1882, the plaintiff and others, without the consent of the defendant, leased the property insured, and surrendered the possession thereof to Joseph Hoskins and his associates. This was a breach of a condition in the policy which rendered the same void, according to the express language thereof.

We are of opinion that, according to the findings of the court and the uncontradicted evidence in the case, the plaintiff was not entitled to judgment. A breach of any one of the conditions contained in the policy was a fatal breach on the party of the assured, and a good defense to his right of recovery. Sections 2607, 2612, Civil Code. We cite the following authorities as bearing on the points decided in this case: *Gladding v. Insurance Co.* 4 PAC. REP. 764; May, Ins. §§ 156, 157; *Ripley v. Insurance Co.* 30 N. Y. 162; Civil Code, § 2611.

Judgment and order reversed.

I concur: SHARPSTEIN, J.

I concur in the judgment: THORNTON, J.

(67 Cal. 433)

CITY OF LOS ANGELES v. SOUTHERN PAC. R. CO. (No. 9,717.)

Filed August 29, 1885

TAXATION AND LICENSING OF RAILROAD COMPANY—OBLIGATION OF CONTRACT.

Plaintiff, a municipal corporation, granted a right of way, and conveyed certain real and personal property to defendant, a railroad company, on condition that it would run its railroad, and build a station, depot, and workshops, at the plaintiff city. *Held*, that this did not constitute such an express grant to defendants of the right to operate its road as to exclude it from liability to a license tax in common with others engaged in a like pursuit; and it therefore follows that an ordinance of the plaintiff, imposing such license on defendant, is not obnoxious to the charge of being in violation of a contract.

Commissioners' decision.

Department 2. Appeal from superior court, Los Angeles county.

Glassill, Smith & Patton, for appellant.

W. D. Stephenson, for respondent.

SEARLS, C. This action was brought to recover \$1,220 alleged to be due for license tax. Plaintiff had judgment. Appellant does not here challenge the authority of plaintiff to provide by ordinance for the collection of a license tax upon business and occupations carried on within the corporate limits of the city of Los Angeles, including such license tax "for every steam railroad company having depot in said city." The validity of the ordinance upon which this action is founded was passed upon in case of *City of Los Angeles v. Southern Pac. R. Co.* 61 Cal. 59. The points made here, and which, it is claimed, were not involved in the case quoted above, are: (1) That by virtue of an ordinance of the city of Los Angeles, approved October 24, 1872, an ordinance of the board of supervisors of Los Angeles county, and an agreement of defendant therein referred to, and certain other ordinances relating to the same subject-matter, a contract between the parties, plaintiff and defendant, was created, by the express terms of which it became the duty and right of defendant to establish its depot, and to maintain and operate its railroad, in and through the city, and that the subsequent deed and ordinances of the city relating thereto constituted an express grant to the defendant of the right to maintain its depot and operate its road without any further license from the city. (2) That the ordinance imposing a license upon the defendant is in contravention of the terms of this contract, and impairs its obligation, and is therefore void as against defendant.

From a review of the findings of the court below, and of the evidence upon which those findings are based, we conclude the city of Los Angeles and the county of Los Angeles were alike desirous that the defendant corporation should construct its railroad through the county, and locate its depot and shops within the city limits; and that, as an inducement thereto, they, and each of them, were willing to make, and did make, concessions in the way of bonds and stock, and that the plaintiff granted certain lands needed by the corporation defendant, and granted to it free "any and all right of way which said Southern Pacific Railroad Company may require in entering, passing through, and leaving the said city with the main trunk line, to be secured to them free of any claim for damages or other compensation." The court below finds that—

"The plaintiff, for a valuable consideration rendered by the defendant, granted to the defendant the right to construct its road, depots, workshops, in said city, and to operate the same, and to carry on its business connected with said road and depots in said city; but, by virtue of said ordinances and contract, the defendant has not the free nor unrestricted right to operate its said roads, depots, or workshops, or carry on its said business within said city, free from any tax, license, or other impositions from said city."

This further fact is found:

"The court further finds that there was no consideration paid, or contracted to be paid, by the defendant to the county or city, or either of them, to the plaintiff for exemption from taxation."

If there is anything in the evidence which can be said to militate against the two findings above set out, it must be found in the ordinance which provides that, in consideration of the benefits and advantages conferred upon and derived by the city by the location of the passenger and freight depots for the Los Angeles city station of the main trunk line of the Southern Pacific Railroad within said city, etc., the city assigns certain stock to the defendant, and at the same time provides that the defendant shall not, as a consideration for such stock, be required to locate and build its depots, and run the road to the same, unless there shall be deeded to the company certain lands for depot purposes, and certain other land for workshops and other buildings; or in the ordinance approved July 26, 1873, entitled "An ordinance providing a free right of way for the Southern Pacific Railroad through the city of Los Angeles." The ordinance, after reciting that by a certain ordinance passed October 24, 1872, the city was obligated to give to defendant a free right of way through the city for its road, and that the defendant had selected certain streets, proceeds to set apart and dedicate to the unreserved and unrestricted use of defendant such streets for a right of way, and to grant to defendant the right of way over the same for the uses and purposes of its road, etc.

We fail to find in this testimony anything in conflict with the facts as found by the court. The city was the owner, as we suppose, of certain lands and personal property, which it was willing to convey to defendant, provided it would build its road through the city, and build its depot and workshops therein, and the former was also willing, as a further inducement, to grant a right of way through the city to defendants for its road free from all expense or damage. It does not follow that the business of the defendant, when established and prosecuted, or its property, were to be free from the burdens of taxation, or exempt from such license tax as might lawfully be imposed upon other persons owning like property and using it in like manner. There was a contract between plaintiff and defendant. It related to the manner of acquiring certain property and easements. It did not, however, confer upon the grantee any rights, privileges, exemptions, or immunities in the ownership or use of the property to which it would not have been entitled had it purchased the same property at private sale from an ordinary citizen, or condemned and paid for it under the right of eminent domain. The case of *City of Los Angeles v. Los Angeles Water Co.* 61 Cal. 65, is not in point. There the plaintiff entered into an agreement with the predecessors in interest of the defendant, by which, for an annual rent reserved, and other considerations, defendant, the holder of a lease of plaintiff's water-works, as assignee, had a right to sell and distribute water for domestic pur-

poses, and to receive the rents and profits to its own use. The right to sell water, and carry on the business of selling and distributing water for profit, was granted by plaintiff, and an ordinance imposing a license tax upon all persons vending water for domestic purposes was held invalid against defendant, upon the ground that plaintiff, under its contract, had already reserved a sum to be paid by defendant for the privilege of vending water for domestic purposes, and could not, during the term of the lease, increase the amount to be paid for the privilege granted. The present case differs from that in this: there, plaintiff had received a consideration for a *privilege granted*; here, no privilege had been granted to carry on a business, and no compensation had been received for any such grant. Plaintiff had granted a right of way and conveyed certain property as any private owner of such property might have done,—nothing more.

This did not, as we think, constitute such an express grant to defendants of the right to operate its road as to exclude it from liability to a license tax in common with others engaged in a like pursuit. It follows that the ordinance imposing a license upon defendant is not obnoxious to the charge of being in violation of a contract. By this reasoning we do not mean to imply that it is in the power of a municipal corporation, by a contract concerning its property, to divest itself of any of its governmental functions.

We are of opinion the judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

PEOPLE v. FRENCH. (No. 20,071.)

Filed August 29, 1885.

1. CRIMINAL LAW AND PROCEDURE—MURDER—VERDICT—DEATH PENALTY.

If on a trial for murder in the first degree the jury, in rendering their verdict, fail to attach any penalty, the duty of the court is to impose the death penalty. Instructions in this regard reviewed, and *held* sufficient.

2. SAME—EVIDENCE—CREDIBILITY OF WITNESS.

Certain evidence reviewed, and *held* admissible to affect credibility of witness.

3. SAME—TESTIMONY AS TO UNDERSTANDING OF WORDS USED BY ANOTHER.

A witness cannot testify to his understanding of the meaning of words used by another, or to inferences drawn by him from a "combination of circumstances tending to throw light" on the question of feeling between two persons. That is a matter for the jury, upon proof of the words or circumstances themselves, and a question for the purpose of drawing out such matter is objectionable.

4. SAME—OBJECTIONABLE QUESTIONS—EFFECT OF STRIKING OUT.

Where an objectionable question is asked, and the answer thereto stricken out by consent of the parties, the question is considered not answered; and if the court also instruct the jury to disregard the matter because it is stricken out, defendant is not prejudiced by such answer.

In bank. Appeal from superior court, county of Amador.

Eagon & Armstrong, for appellant.

The Attorney General, for respondent.

McKEE, J. Appeal from a judgment of conviction of murder in the first degree, and an order denying a motion for a new trial.

1. The material point upon which the defendant relies for a reversal of the judgment is that the jury were misled, by the instructions of the court upon the question of punishment, to return a verdict of murder in the first degree, without a declaration of what the punishment should be. The charge of the court as to the power and duty of the jurors upon that question was quite elaborate. Altogether six or seven instructions upon the subject were given, which might have been more forcibly expressed by reading to the jury section 190 of the Penal Code. But the thought expressed by the several instructions was this: If the jury should agree to find the defendant guilty of murder in the first degree, then they had the right, under the law, in the exercise of their duties, to go further and determine the punishment of the defendant; *i. e.*, whether he should suffer the highest penalty of the law—death—or the milder punishment of imprisonment for life. If they determined upon the former, it would not be necessary for them to declare it in their verdict; but if upon the latter, it would be. It is true that in the elaboration of the instructions upon that question the court did not directly tell the jury that if they did not, by their verdict, declare the punishment, the court, on a verdict returned by them of murder in the first degree, would have to pronounce judgment of death; but later on in the proceedings it did give them to understand that if they did not declare in their verdict that the punishment shall be imprisonment for life, the court would have to perform its duty by imposing the punishment of the law. Upon receiving the original charge the jury retired for deliberation, and afterwards, being brought into court, announced they were agreed upon the question of guilt, but not upon the question of punishment. Upon that announcement the following took place between the court and jurors:

"*Court*. Do I understand the jury to disagree simply upon the matter of punishment? *Juror*. Yes, sir. I am not willing to pass sentence * * * by which the man should be killed, because I think there were some mitigating circumstances. * * * *Court*. The jury have the right to fix the penalty at death or imprisonment for life. * * * If the jury bring in a verdict of guilty of murder in the first degree, without specifying the penalty, they may do so. *Juror*. Then we are not compelled to do it? *Court*. You are not compelled to do it; you simply have the discretion."

The jurors again retired, and again returned into court for information upon the same subject. The same juror, addressing the court, said:

"I got the impression that if the verdict was returned of guilty of murder in the first degree, without anything further, it indicted the death penalty. Some of my fellow-jurors thought it did not. I want to be certain of that."

The court again read to the jury section 190 of the Penal Code, and in connection therewith said to the jurors:

"* * * If there is nothing specified [in your verdict] as to the penalty, the court will have its duty to perform, but what the duty will be the court will not say."

Of the duty of the court upon receiving a verdict of guilty of murder of the first degree there could have been no doubt in the mind of the judge. The law, as construed by this court, is clear.

"If a jury shall agree that a defendant is guilty of murder in the first degree, but cannot agree that the punishment shall be imprisonment for life, or shall not declare that the punishment shall be such imprisonment, it will be the duty of the court to pronounce judgment of death. The jury need not declare that death shall be inflicted, in cases where they cannot agree on imprisonment, since, if the verdict is silent in respect to the penalty, the court must sentence the defendant to death." *People v. Welch*, 49 Cal. 185.

We do not, therefore, understand why the court should have hesitated to directly say to the jurors what his duty would be in case they returned a verdict of guilty of murder in the first degree. But the question is, did that hesitancy in any way mislead the jurors as to their powers or duties? The jury *did* agree upon their verdict, and, in the performance of that duty, it is not claimed that they were misled by any of the instructions of the court. They did not agree on imprisonment of the defendant for life, but they returned a verdict of murder in the first degree, which was silent in respect to the penalty. Were they prevented from agreeing on the penalty by any of the instructions of the court upon that subject? We think not. The only juror who doubted in the matter seems to have been at last satisfied with the information which he obtained from the court; for, upon receiving that information, he agreed to a verdict without a declaration as to the punishment, and returned the same to the court as his verdict. There is nothing in the record tending to show that he had any doubt as to the grade of the crime of which the defendant was guilty. This result was reached after receiving the elaborate and reiterated instructions of the court as to their power and duty upon the question of punishment; and we cannot see how any of the jurors could have been misled into disagreement upon the question by anything contained in the instructions. Besides, we think it evident that the jury were not misled; for there was no dissent to the verdict as rendered. At the request of counsel for defendant the jury were polled, and each one answered that it was his verdict,—the doubtful juror saying, when his name was called, "Yes, that is my verdict, and I will leave the responsibility to the court." After which the polling of the jurors proceeded further, and *all* the jurors answered, "Yes, that is my verdict."

2. The homicide of which the defendant was convicted was of a man named Peter Wells. It was committed in the town of Oleta, Amador county, on the fourteenth of March, 1884. On the trial of

the case, Lee Marcellus—a man who had been in the employ of Wells—was examined as a witness for the defendant, and gave testimony tending to show that on the morning of the day of the homicide, Wells, being armed, started to go to the town of Oleta, where he expected to meet with French, with whom he had had previous differences, and wanted the witness to arm himself and go with him; but the witness refused, and tried to dissuade Wells from going, saying to him that “he would meet French there, and there would be shooting.” To which Wells replied, “If there was to be trouble, there was no use in trying to stave it off.”

In cross-examination the district attorney asked the witness questions to draw out a conversation between him and the wife of Wells, after the homicide, in which he told her that he had said to Wells, a few days before the homicide, “If he would let him [the witness] have a rifle he would put French in a prospect hole,” and that Wells said to him “he didn’t want anything of that kind.” Objections to the questions upon the grounds of irrelevancy, immateriality, and want of preliminary proof were overruled by the court, against defendant’s exceptions. In answering the questions the witness testified, in substance, that a day or two before the homicide the witness had said to Wells: “If I thought that man [French] was hunting us in the *chaparral* I would go down and get him;” to which Wells said, “No;” and that he (the witness) did not remember whether he had told it to Mrs. Wells, but if he had, he told it to her as it was. Manifestly, the court admitted the evidence to affect the credibility of the witness. We cannot see any other ground upon which it was entitled to admission. If counsel for the defendant understood that it had been admitted on any other ground, or was apprehensive that it might have been used for any other purpose in the case, he could have asked the court by a proper instruction to have limited it to the question of the credibility of the witness; but, having failed to do that, we cannot see that there was any prejudicial error in the ruling or action of the court in the matter.

3. After the defendant had rested his case, the district attorney called a witness, of whom he asked the following question:

“During your association with the deceased, Wells, and the actions on his part, from words of his and combination of all the circumstances that would tend at all to throw light on the subject, what was the feeling, and the expressed feeling, between Wells and French?”

The court should have sustained the objections made to the question. A witness cannot testify to his understanding of the meaning of words used by another, or to his inferences drawn by him from a “combination of circumstances tending to throw light” on the question of feeling between two persons. That is a matter for the jury upon proof of the words or circumstances themselves. The question was therefore objectionable. But the question itself was not answered, for the record shows that the answer of the witness to the

question was by consent of the district attorney stricken out; and the court also instructed the jury to disregard it because it was stricken out.

There being no prejudicial errors in the record, the judgment and order must be affirmed.

We concur: MYRICK, J.; MORRISON, C. J.; THORNTON, J.

(67 Cal. 402)

WHITE v. DISHER. (No. 9,486.)

Filed August 25, 1885.

WITNESS—PRESUMPTION FROM FALSITY OF PART OF TESTIMONY.

A "witness false in one part of his testimony is to be distrusted in others," under the statutes of California. Code Civil Proc., § 2061. Such distrust is a presumption raised by law for the court, and with which the jury has nothing to do but to receive and act upon, and it is rebuttable, and may be overcome by facts and circumstances, of which they are the sole judges.

Commissioners' decision.

Department 2. Appeal from superior court, Trinity county.

W. J. Tinnin and T. L. Carothers, for appellant.

C. E. Williams and J. W. Phillbrook, for respondent.

SEARLS, C. Action to recover damages on breach of contract. Plaintiff had verdict and judgment for \$714, and costs. Defendant moved for a new trial, which was denied, and the appeal is from final judgment and order overruling motion for new trial. We have examined the several errors assigned by appellant, and conclude that, with a single exception, they are not supported by law. The exception referred to is as follows: At the trial defendant asked the court to instruct the jury in these words: "A witness willfully false in one part of his testimony is to be distrusted in his other testimony." The instruction was modified by the court by striking out the words "is to" and inserting in lieu thereof the word "may," so that the instruction as given read: "A witness willfully false in one part of his testimony may be distrusted in his other testimony." To which modification of the instruction defendant excepted, and the ruling is assigned as error. Section 2061, Code Civil Proc. subd. 3, provides "that a witness false in one part of his testimony is to be distrusted in others." The rule, as formulated in the Code, is substantially the same as that laid down by law writers, and followed by the courts prior to the adoption of our codes. In *People v. Sprague*, 53 Cal. 494, the court say:

"The maxim, *falsus in uno, falsus in omnibus*, is not to be construed as authorizing a court to charge that if a witness *perjures* himself in respect to one or more particulars, the jury must reject all his testimony. *People v. Strong*, 30 Cal. 156. The rule is that the jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; that is to say, the jury, being convinced that a witness has stated what was

untrue, not as the result of mistake or inadvertence, but willfully and with the design to deceive, must treat all his testimony with distrust and suspicion, and reject all, unless they shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth. The third subdivision of section 2061 of the Code of Civil Procedure is but declaratory of the rule above considered, and, by requiring a jury to distrust, necessarily authorizes them to reject all the testimony of such a witness in a proper case."

In that case defendant's counsel had asked the court to instruct the jury in the language of the Code, and the court had added the word "willfully" before the word "false," and the contention in this court was as to the propriety of such addition, and it was held proper, and that "the word 'willfully' did not change the effect of the instruction as offered." *People v. Soto*, 59 Cal. 367, and *People v. Hicks*, 53 Cal. 354, are to the same general effect. The question involved in the present case is, however, somewhat different from the contention in those cited. Here the law provides that a witness willfully false in one part of his testimony *is to be distrusted*,—not that the jury *may* or *may not* distrust his testimony, but they are to be told that, as matter of law, his testimony *is to be* distrusted. This distrust forms the basis or stand-point from which they must view his testimony; the standard by which to weigh his utterances. It is true that, notwithstanding this legal distrust which the law casts upon a witness willfully false in a material part of his testimony, the jury may believe him upon other points; they are to be the sole judges as to that; there may be abundant reasons why they not only *may*, but why they should, believe him in other particulars. The truth is not to be rejected because it passes through a false medium; but, as to the existence of the truth, the jury is the sole judge. The jury was told that in such cases a witness *may* be distrusted. The law says he *is to be* distrusted, that is, that he must be distrusted. A thing that *is to be*, *must be*. The distrust which is cast upon a witness willfully false in a material part of his testimony is a presumption of law for the court, and with which the jury has nothing to do except to receive and act upon. It is a rebuttable presumption, to be overcome by facts and circumstances over which they are the sole judges.

The word "may" inserted by the court was not synonymous with the *is to* of the Code; it imported to the jury that they might or might not, at their option, distrust a witness willfully false in one portion of his testimony, when, as matter of law, they *must* distrust him, and *may*, or *may not*, notwithstanding such distrust, believe him. The law presumes every man accused of crime innocent until his guilt is shown. This is a presumption not to be acted upon or rejected by a jury at their will or pleasure. So a witness willfully false is to be distrusted by a jury, and with this distrust as a factor in the problem, they *may*—they are at liberty to—believe or not to believe him in other particulars.

We think the court below erred in its modification of the instruc-

tion, and that for such error the judgment and order should be reversed and a new trial ordered.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

(87 Cal. 412)

PEOPLE v. RICHARDS. (No. 20,094.)

Filed August 28, 1885.

1. CONSPIRACY—FORM OF INFORMATION FOR.

An information for a conspiracy need not be against conspirators jointly, and is therefore not insufficient because it is against a single individual.

2. CONSPIRACY TO ROB.

A conspiracy to compel a person to sign his bank check, and then to take it from him forcibly, constitutes a conspiracy to rob.

In bank. Appeal from superior court, Santa Clara county.

H. C. Moore and J. H. Campbell, for appellant.

Herrington & Bane, for respondent.

McKINSTRY, J. The superior court sustained a demurrer to an information, which is in words and figures as follows:

"*In the Superior Court, etc.* John Richards is accused by the district attorney of the county of Santa Clara, state of California, by this information, of conspiracy, committed as follows: The said John Richards, on or about the ninth day of September, A. D. 1884, at the county and state aforesaid, did conspire with one David Davis, feloniously and by means of force and fear, to take certain bank checks to and of the value of fifteen thousand dollars from the person and immediate presence of one Henry Miller, the owner thereof, against the will of said Henry Miller, (and immediately theretofore, and for the purpose of said taking, to compel said Henry Miller, by means of force and fear, to draw, make, and sign said checks;) and said defendant, in pursuance of said conspiracy, and to effect the object thereof, did, on or about the date last named, proceed from the town of Hollister, in the county of San Benito, state of California, to the city of Gilroy, in the county of Santa Clara, in said state, and did arm and disguise himself, and, on the thirteenth of September, 1884, did set forth from said city of Gilroy along the road leading therefrom to the certain place in the county last aforesaid known as 'Pacheco Pass,' there to lie in wait for said Henry Miller, and consummate the purpose of the said conspiracy, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

From the judgment on demurrer the people appealed. Counsel for respondent makes the point, "There must be two persons, at least, charged jointly *as defendants* in every information for conspiracy;" and adds: "To the general rule there is this only exception: one can only be charged or convicted of conspiracy when he is charged to have conspired with persons 'unknown,' or beyond the jurisdiction of the court." As supporting the point, respondent cites Penal Code, note to section 1160; Russ. Cr. §§ 492-548; 2 Bish. Crim. Law, §§ 188, 189;

1 Bish. Crim. Proc. §§ 963, 964. The note to section 1160 of the Penal Code merely lays down certain propositions, not necessarily involving the one here presented, and refers to adjudications (mentioned in the text writers or directly cited by respondent) to sustain such propositions. We have seen no edition of Russell on Crimes divided into *sections*. In the eighth American edition of that work (Davis and Metcalf) it is said:

"From the nature of conspiracy it is an offense which cannot be charged to have been committed by one person alone. And upon this ground it has been holden that a prosecution for a conspiracy cannot be maintained against a husband and wife only," etc. Volume 2, p. 690.

No one can dispute, or has ever disputed, that the offense cannot be committed by one alone, and it would seem that the husband and wife were one, in the sense that they could not conspire without the co-operation of another, at least. Section 189 of Bishop's Criminal Law (volume 1) does not bear upon the point, nor does section 188 help to solve the precise question. By way of *argument*, it may be said, *because* one cannot commit a conspiracy, or because when two are charged as defendants the acquittal of one operates as an acquittal of the other, therefore the indictment must be against two persons, with the exception that one may be informed against if it be stated in the information that the other conspirator is dead or unknown or out of the state. The argument may be given such force, if any, as it is entitled to. But the 188th section is cited by counsel as authority to the point that at least two *must* be charged "as defendants." It is enough to say that Mr. Bishop draws no such inference from the premises by him laid down. Sections 963 and 964 of Bishop's Criminal Procedure (volume 1) treat of "Steps Where Private Person Prosecutes," and "Steps if Prosecuting Officer." They do not speak of conspiracy at all. At section 464 (same volume) Mr. Bishop quotes Starkie:

"An indictment for conspiracy cannot charge the offense against one only, for the very nature and essence of the crime exclude the idea of its commission by a single individual. But the indictment may allege that the defendant, *together with other persons*, committed the offense."

Bishop adds:

"So that even here there is no legal necessity for proceeding *jointly* against the two or more conspirators."

And in section 225 of the Criminal Procedure (volume 2) the same learned writer very clearly intimates his opinion that, upon principle, when two or more conspirators are living and within the jurisdiction, one of them may be separately indicted. He says:

"The conspirators may, as of course, be jointly indicted; nor, if they are, will the court generally direct that they be separately tried. But if one of two dies, the living one may be indicted and tried, and it is the same of a known conspirator where the other is unknown; and probably it is legally competent to indict known and arrested conspirators separately, while yet the court might interfere to correct so inconvenient and unusual a course."

If one can be separately indicted, two being named in the indictment as conspirators, the *indictment* is sufficient as against demurrer, whatever action the court might assume to take to prevent the practice.

In support of his point respondent's counsel also cites 1 Whart. Crim. Law, § 431; Whart. Prec. 607-673; Whart. Crim. Ev. § 393. At section 1388 of his Criminal Law, Dr. Wharton says:

"A conspiracy must be by two persons at least. One cannot be convicted of it unless he has been indicted with persons to the jurors unknown."

And the same learned writer employs similar language in a note to the form No. 607, inserted in his Precedents. As to Wharton's Criminal Evidence, here, again, there is some error in the citation. Section 393 does not relate to the subject. In a note to the statement in section 1388, above quoted, Wharton cites 1 Hawk. c. 72, and a large number of reported decisions. Assuming that by "Hawk. c. 72," is intended 1 Hawkins' Pleas of Crown, chapter 27, it is there only laid down that under the statute, (21 Edw. I.,) one person alone cannot be guilty of conspiracy; and therefore no prosecution under it was maintainable against a husband and wife only. Page 448, § 8. Of the cases cited *Regina v. Thompson*, 5 Cox, Crim. Cas. 166, only holds that where an indictment charged that A., B., and C. conspired together, with divers other persons to the jurors unknown, and no evidence was offered affecting other persons than A., B., and C., and the jury acquitted B. and C., but found A. guilty, A. was entitled to an acquittal. In *Mulcahy v. Reg.* L. R. 3 H. L. Cas. 306, the defendant was indicted with five other persons. Mulcahy demurred to the indictment, because the overt acts were not properly set out. The judgment of the court was that the objection was not sufficient in law to prevent the defendant from being compelled to plead to the indictment, and the house of lords affirmed this judgment. In the course of an opinion, Mr. Justice WILLES said—what is everywhere admitted—that a conspiracy is (in the absence of statutory limitations) an agreement of two or more to do an unlawful act, or a lawful act by unlawful means. There is nothing in that case to uphold the view of counsel for the respondent in the case at bar. If "*R. v. Denton*," cited by Wharton, is "*Reg. v. Inhabitants of Denton*," 1 Dears. Cr. Cas. Reserved, p. 3, it is merely to the effect that where an indictment is framed on an act of parliament, and the act is repealed after the indictment and before plea pleaded, a judgment against the defendant must be arrested.

U. S. v. Cole, 5 McLean, 513, was a case in which 12 persons were indicted for conspiracy with one Filley, deceased. There is no intimation in the report bearing on the question now before us. *Com. v. Irwin*, 8 Phila. 380, only determined that to justify a conviction on a count charging conspiracy the jury must be satisfied that there was an unlawful combination by the defendant with at least

one other person. In the note to section 1388 of Wharton's Criminal Law, in which the foregoing cases are cited, reference is made to section 305 of Wharton's Criminal Pleading and Practice, where it is said:

"In an indictment for conspiracy less than two cannot possibly be joined; a wife and husband together not being sufficient. * * * But it is clear that one defendant may be tried alone when his co-conspirators are alleged to be unknown, or when such co-conspirators are *dead or absent or previously convicted.*"

From section 305 we are referred to section 755 of the same book. There the rule is laid down:

"In riot or conspiracy there cannot be a conviction of a single defendant, coupled with an acquittal of co-defendants, unless there is an allegation and proof of the co-operation of parties not indicted."

In a note to section 305, in addition to the case of *U. S. v. Cole*, reference is given to *Reg. v. Gompertz*, 9 Q. B. 824; *Com. v. Manson*, 2 Ash. 31; *State v. Tom*, 2 Dev. 569; and *State v. Covington*, 4 Ala. 603. In *Reg. v. Gompertz* several persons were indicted together. It was held that, where all are convicted, if one shows himself entitled to a new trial on grounds not affecting the others, a new trial should be granted to all. In *Com. v. Manson* the action of the court in denying a separate trial to one of two persons jointly indicted for a conspiracy was approved. *State v. Tom*, 2 Dev. 569, is an interesting case, because of the able and learned opinion rendered. But there, too, the actual point decided was that on an indictment for conspiracy against two the acquittal of one is the acquittal of the other. Nothing is said in the opinion which directly sustains the view contended for in the present case, that an indictment cannot be sustained wherein the single defendant is charged to have conspired with another *named person*, unless it is averred that the latter is dead or out of the jurisdiction, etc. *State v. Covington*, 4 Ala. 603, only holds that where several are indicted and found guilty of a conspiracy, a motion in arrest of judgment will be entertained at the instance of any one, although the others are not in court and may have escaped from custody.

In addition to the text-books above mentioned, counsel for respondent also cites *Rex v. Kinnersley*, 1 Strange, 193; *State v. Egan*, 10 La. Ann. 698; *People v. Olcott*, 1 Amer. Dec. (2 Johns. Cas.) 168; and *State v. McDonald*, 10 Amer. Dec. (1 McCord,) 691. *Rex v. Kinnersley* decides that where two are indicted for a conspiracy, and one only appears and pleads to the issue, and is found guilty, judgment shall be given against him before the trial of the other. The Louisiana case holds that a judgment against one indicted for a riot, with three co-defendants and "divers other persons unknown," will not be arrested because his co-defendants were found "not guilty." *Non constat* but he may have been guilty of a riot with the persons unknown. It was held in *People v. Olcott* that where one of three persons, en-

gaged in a conspiracy, died before trial, and another was acquitted, the survivor might be tried and convicted. *State v. McDonald* was a case where the indictment charged that McDonald and another, "together with divers other persons, to-wit, to the number of five," had committed the crime of riot. A motion in arrest of judgment was made "simply on the ground that the names of the others *should have been given*, or, if unknown, that fact should have been expressly stated." In South Carolina a riot could not be committed by less than three persons, and the court sustained the objection taken to the indictment; holding, in effect, that the names of the "others" should have been given, or their names declared to be unknown. We so understand that case. It is true, the reporter states the indictment was against the defendant and two others, charging that they "together with other persons," etc. But it is also stated that the grand jury found a true-bill against the defendant "and one other only." If the statements could be construed to mean that the two indicted were charged to have committed the riot with a third person named, "together with others," etc., the objection to the indictment would not have been sustained, because the name of a third person was given. In the last case the court said:

"The names of third persons, if they are necessary to the constitution of the offense, or constitute a necessary part of its description, should, if known, be *inserted*."

In a note the compiler adds:

"If several be indicted for a riot, and the jury acquit all but two, they must acquit them also, unless it be charged in the indictment that these committed the riot, together with some other person *not tried on that indictment*."

But, to prevent misapprehension, see Penal Code of California, 404, which makes it possible for two persons to create a riot.

It has sometimes been said that if an indictment charges a conspiracy against a defendant, committed with a person unknown, and the third person was in fact known, the prisoner must be acquitted. *State v. McDonald, supra*; Chit. Crim. Law, 212. But in *People v. Mather*, 4 Wend. 230, it was held that if the co-conspirators are stated to be unknown, the indictment is good, even although the names of the co-conspirators must actually have been known to the grand jury.

We have endeavored to go over carefully all the cases cited by respondent, or by the writers to whom he has referred. Of course, it is possible that we have failed to notice isolated expressions in the opinions of judges which might be deemed to favor the view of counsel, but we are not conscious of having overlooked such expressions. In no one of the cases, however, was it decided that an indictment against one charged as a conspirator was defective because the name of the third person with whom the defendant was charged to have conspired was given in the indictment. If there were no precedents for an indictment or information against one in which he was charged with another named person, the respondent would be entitled to the

benefit of any inference which could fairly be drawn from that circumstance. But when a case is only new in instance, but not new in principle, the mere failure to discover a precedent in which the principle was applied to exactly the same facts is of little weight or consequence. *Pasley v. Freeman*, 3 Term R. 63; *Ashby v. White*, 1 Smith Lead. Cas., Hare & W's. notes, 455. And, as we have seen, the styling one as "unknown" has been held sufficient, although the name of the person was, in fact, known to the grand jury. *People v. Mather*, *supra*. This must be construed to be an adjudication that a grand jury is not bound to join as defendants in one indictment all those who are known to them to have joined in the same conspiracy. Clearly, the information states facts (assuming that the nature of the conspiracy itself is sufficiently averred) which show that the defendant has been guilty of the offense. It requires two to conspire, but if two have conspired each is guilty of the conspiracy. True, if the name of the one is unknown, his name cannot be inserted in the indictment. But where a person is designated as "unknown," a particular individual is thus indicated; he is the person who is alleged to have joined with the defendant in the acts constituting the conspiracy. It is difficult to understand upon what ground the defendant can complain if the alleged co-conspirator is more distinctly identified by giving his name. As was said in *People v. Mather*, "an indictment should contain so much certainty as clearly to designate, not only the particular kind of offense, but the specific criminal act for which the accused has to answer." But there and elsewhere it has been held that the defendant was sufficiently informed of the person with whom he was accused of conspiring when such person was charged to be "unknown."

The alleged conspirator, not indicted, is a "third person" whose existence is necessary to the completion of the offense, and who must always be described with reasonable certainty; as, in robbery, the person robbed; in larceny, the person whose property is alleged to have been stolen. In case of conspiracy there must have been another person without whose co-operation the defendant informed against could not have committed the crime. Such person must be identified by name, or otherwise in such manner as that the defendant may know with what offense *he* is charged.

It may be urged that there is a species of injustice in selecting for prosecution one of two averred to be equally guilty, when, for aught that appears, both might have been prosecuted. But is this a matter of which the single defendant ought to be permitted to complain? As we have seen, it has been held that where two are indicted, one may be prosecuted to judgment before the trial of the other. We need not here consider the consequences in case the other shall subsequently be acquitted. We are asked to assume that both are within the jurisdiction of the court, because the information does not affirm that the conspirator died before the filing of the information, or that

ne had withdrawn from the state. Even if this should be conceded, we cannot see why this should relieve the defendant from pleading to an information which gives him full notice of the facts which, if they exist, establish *his* guilt of the offense.

Counsel for respondent says: "There must be two men, at least, *convicted* (subject to the exception as to death, etc.) before the conspiracy is established;" citing 18 Cal. 83; 14 Gray, 57; 2 Russ. Cr. 490; 9 Amer. Dec. 534; Whart. Crim. Ev. (8th Ed.) 392; Barb. Crim. Law, 248. Russell, at the page referred to, treats of "Forgery." Wharton, at the page referred to, treats of the competency of the wife of one defendant to be a witness against another defendant. *Dreux v. Domec*, 18 Cal. 83, was an action for malicious prosecution. We are unable to see what bearing *Com. v. Cobb*, 14 Gray, 57, has upon the proposition of counsel, and, except that *State v. Buchanan*, 9 Amer. Dec. 534, was a prosecution for conspiracy, that case seems to have no relation to the proposition here asserted. None of the cases last cited are to the point that the conspiracy cannot be established *as against the one indicted*, who is charged to have conspired with another not indicted. Barbour in his Criminal Law, 248, speaks of conspiracy, but seems to add nothing to what has already been said with respect to the precise point under consideration. In *Adams v. People*, 9 Hun, 89, the indictment charged that Adams, the sole defendant, "conspired with one Lamb" to defraud. Lamb had been previously convicted of the same offense, but this did not appear on the face of the indictment, but was only shown as a fact when Lamb was offered as a witness for the prosecution. The court held him competent, as he had been convicted of a misdemeanor, not of a felony. Adams was separately indicted, tried, and convicted. No objection was taken to the indictment by demurrer or in arrest of judgment.

We are not, however, without the authority of adjudications directly sustaining the course pursued by the district attorney in the present case. In *Heine v. Com.* 91 Pa. St. 145, Heine was charged with having "with one Henry Weile conspired," etc. The objection was taken that Heine alone was charged. The court said it is strictly true that a conspiracy is in its nature joint, and that one alone cannot be guilty of the offense. "Nevertheless; one of two or more conspirators may be separately indicted, tried, and convicted. 3 Chit. Crim. Law, § 1141. Therefore, that Weile has not been indicted with Heine can make no difference, if it sufficiently appears from the record that he was a confederate."

In *U. S. v. Miller*, 3 Hughes, C. C. 553, the information charged a conspiracy by three persons, Miller, Lee, and Gettslick. Lee was dead, and Gettslick was already under conviction "for an act committed in furtherance of the conspiracy charged." The learned judge said:

"It is not the practice of the government to prosecute any person to conviction for more than one of the same *series of offenses*. Hence there is no

indictment here except against Miller. * * * The particular question arising on demurrer, therefore, is, will an information against him alone lie without joining Gettslick? * * * As there may thus be a severance in the trial, in the verdict, and in the judgment, we may conclude there may also be a severance in an indictment for a conspiracy, unless there be some reason peculiar to such an indictment plainly making the several proceedings improper. I can see no such reason. It will not do to say that, because two, at least, must be convicted of a conspiracy, and that one person who should be the only one convicted must be discharged, therefore two, at least, must be joined in the indictment. But that same reasoning would forbid the severance of the trial, and deprive any one of his right to be tried alone. If it be conceded that there may be a severance in the trial of persons jointly indicted for a conspiracy, it follows, so far as the reason just alluded to is concerned, that there may likewise be a severance in the indictment. Some of the text writers say (*arbitrarily*) that indictments for conspiracy must be joint; but they give no reason, other than the one just stated, for their proposition, and it is difficult to find a reason. I do not think any sufficient reason exists."

The learned judge then proceeds to examine *U. S. v. Cole*, *People v. Mather*, *Rex v. Kinnersley*, and *Rex v. Nichols*, 13 East, 412. He finds nothing in those cases which would prohibit the indictment of one of two known conspirators. Our conclusion upon the point is that the information is not insufficient because it is against a single defendant and the name is given of the person with whom he is charged to have conspired.

In addition to the objections above considered, respondent claims that no crime is charged, inasmuch as a conspiracy to compel one to sign a bank check and then to take it from him by force is not "a conspiracy to rob." "Robbery is the taking of personal property from the person of another by means of force." Penal Code, § 211. "Personal property" includes things in action and evidences of debt. Penal Code, 7. It is a *conspiracy* to rob, even although the conspiracy include an agreement to compel the making of the checks which are to be taken by force from the person. It is part of the unlawful agreement that a robbery shall be accomplished.

Judgment reversed and cause remanded, with direction to the court below to overrule the demurrer and require the defendant to plead to the indictment.

We concur: MYRICK, J.; ROSS, J.; THORNTON, J.; MORRISON, C. J.

I concur in the judgment: MCKEE, J.

(2 Cal. Unrep. 529)

WHITESIDES and others, Ex'xs, etc., v. BRIGGS, Ex'x, and another.
(No. 9,894.)

Filed August 28, 1885.

1. EVIDENCE, CONFLICT IN—REVERSAL.

Where evidence is substantially conflicting, judgment will not be reversed on the ground of insufficiency of the evidence to justify it.

2. FINDINGS—ON WHAT MATTERS NECESSARY.

The judgment will not be reversed where there are findings on all the issues because of findings on probative matters outside of the issues.

3. COMPLAINT HELD SUFFICIENT.

Commissioners' decision.

Department 2. Appeal from superior court, Los Angeles county.

BELOHER, C. C. This is an action to set aside a deed to a lot in the city of Los Angeles, upon the ground that it was obtained by fraudulent misrepresentation. The defendants interposed a general demurrer to the complaint, which was overruled, and then filed separate answers. The case was tried, and findings and judgment entered in favor of the plaintiffs. The appeal is from the judgment and an order denying a new trial.

1. There was no error in overruling the demurrer. The complaint stated facts sufficient to constitute a cause of action, and was certainly good when tested by a general demurrer.

2. The findings are very full and cover all the material issues. The fact that there were findings upon probative matters outside of the issues is no reason for reversing the judgment.

3. A careful reading of the transcript has satisfied us that there was testimony tending to support all of the findings. No useful purpose would be subserved by stating the testimony here. On many points it was conflicting, but when there is a substantial conflict this court never reverses judgments upon the ground that the evidence was insufficient to justify the decision.

We think the judgment and order should be affirmed.

We concur: **FOOTE, C.; SEARLS, C.**

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

GWINN, Adm'r, v. HAMILTON, Adm'r. (No. 9,630.)

Filed August 29, 1885.

ACTION ON OPEN ACCOUNT—WHAT MAY BE RECOVERED.

In an action on an account, where there are not reciprocal demands, the plaintiff can only recover for items which accrued within the last two years preceding the commencement of the suit.

Commissioners' decision.

Department 1. Appeal from superior court, Sacramento county.

Ball & Craig and *Beatty & Denson*, for appellant.

Henry Edgerton and *Ad. C. Hinkson*, for respondent.

FOOTE, C. Action on "an open, mutual, and current account." The account sued on was not reciprocal in its demands, and is not within the provisions of section 344, Code Civil Proc. All that the plaintiff was entitled to recover were the charges made for the last two years of Belden Gwinn's service as a man of all work in his father's employ. We perceive no further error on the part of the court in the case. The judgment and order should be reversed and the cause remanded.

We concur: BELCHER, C. C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded.

HINES v. ROADHOUSE, a Justice, etc. (No. 20,130.)

Filed August 29, 1885.

WRIT OF REVIEW, WHEN LIES.

A writ of review does not lie when the petition for the writ itself shows, on its face, that the court below had jurisdiction.

Application for writ of review of proceedings in the justice's court, resulting in a conviction of petitioner for keeping a house of ill-fame, and of proceedings in the superior court affirming the judgment of the justice's court.

Department 1.

Geil & Morchouse, for petitioner.

By THE COURT. The petition for a writ of review, on its face, shows that the superior court and the justice of the peace had jurisdiction to render the judgments severally sought to be annulled. Writ denied, and petition dismissed.

HULSEY v. BRYAN. (No. 9,094.)

FITZPATRICK v. BRYAN. (No. 9,095.)

WILSON v. BRYAN. (No. 9,096.)

Filed August 29, 1885.

APPEAL—RECORD—FINDINGS.

Findings and record on appeal *held* insufficient, and cause remanded for further findings.

In bank. Appeal from superior court, Shasta county.

Chipman & Garter, for appellant.

C. W. Taylor and A. R. Andrews, for respondent.

BY THE COURT. These cases are not so presented in the record that the court can satisfactorily pass on the titles of the parties so as to determine which has the preferred right to purchase from the state. The cases will go back that all the facts as to the titles of the parties may be found. In finding these facts, the court will insert in the findings all documents showing title in the respective parties. For the purpose indicated the judgments and orders are reversed, and causes remanded, that on the testimony already taken, and on such other evidence as either of the parties may adduce, the court may find the facts, deduce its conclusions of law, and render judgments accordingly. So ordered.

(67 Cal. 295)

KEYBERS v. McCOMBER. (No. 9,602.)

Filed August 27, 1885.

1. INFERIOR AND SUPERIOR COURTS—JURISDICTION—PRESUMPTIONS.

Every presumption is made in favor of the regularity of proceedings and the jurisdiction of superior courts, and a person attacking the same must show affirmatively his ground of objection; but no such presumptions are indulged in in favor of courts of inferior jurisdiction, and such jurisdiction is required to be shown by a person relying on the judgments or proceedings of such courts.

2. SUMMONS IN JUSTICE'S COURT, REGULARITY OF—JUDGMENT.

A summons in a justice's court should contain a direction to defendant that if he failed to appear and answer, plaintiff would "apply to the court for the relief demanded;" but if, instead, the summons states that in such event "the plaintiff will take judgment for the amount claimed in the complaint," (stating it,) a judgment by default, rendered thereon after personal service on defendant, is not void, but voidable only, and cannot be collaterally impeached.

3. EXECUTION—EXEMPTION FROM, WAIVER OF.

Exemption of property from execution is in the nature of a personal privilege, which the debtor may claim or waive at will.

4. EXEMPTION FROM EXECUTION—WHEN AND HOW CLAIMED.

Where a debtor's property is levied upon, except as much as is by law exempt, and thereafter the debtor claims as exempt a portion of the property levied on, leaving in the officer's hands less than enough to satisfy his writ, the debtor in that case, to sustain his claim of exemption, must offer to surrender to the officer the other property thus in his hands and subject to execution, or as much as may be necessary to satisfy the writ, or he will not be entitled to recover against the officer.

Commissioners' decision.

Department 1. Appeal from superior court, Sacramento county.

W. H. Beatty and S. C. Denson, for appellant.

A. P. Catlin and W. C. Crossett, for respondent.

SEARLS, C. This is an action to recover possession of two horses, their harness, and a quantity of wood; or, if a delivery thereof cannot be had, the value thereof, and damages for detention. Defendant had judgment. The appeal is from this judgment, and the case rests upon the judgment roll. The demanded property was taken by the defendant, as a constable, under an execution regular in form and valid on its face, issued from a justice's court against the property of plaintiff. Plaintiff contends the taking was wrongful, and bases his claim upon two grounds: (1) That the summons was fatally defective in this: The action was for damages on account of trespass upon land, and the summons, in other respects in due form, instead of a notice, as required in such cases by subdivision 5, § 844, Code Civil Proc., that if defendant (plaintiff here) failed to answer, the plaintiff would "apply to the court for the relief demanded," contained the notice specified in subdivision 4 of the same section, viz., that in case of failure to answer plaintiff would take judgment for \$299,—that being the sum claimed in the complaint. (2) That, conceding the regularity of the judgment against him, the two horses and their harness were exempt from execution.

1. As to the validity of the judgment. A justice's court is an inferior court, and its jurisdiction must be shown affirmatively by a party relying upon or claiming any right under its judgments. *Jolley v. Foltz*, 34 Cal. 321. No presumption will be indulged in favor of the jurisdiction of inferior courts. *King v. Handlett*, 33 Cal. 318. In superior courts, the presumption is in favor of the regularity of their proceedings, and of their jurisdiction, and he who challenges either must show affirmatively the grounds of his objection. It does not follow, however, that the rule of decision differs upon the same facts when ascertained. It is only in the mode of ascertaining them that the distinction exists. In a court of record a given fact is presumed; but, when shown by the record not to exist, error is made to appear. In justice's court the same fact must be proven or it will be presumed not to exist, and like error is manifest. It has been said that the "law required courts of special jurisdiction to follow the rules which create and govern them, and that that which in a court of general jurisdiction would be a mere irregularity, would absolutely deprive the former of all jurisdiction." *Whitwell v. Barbier*, 7 Cal. 54. Similar language may be found in a number of cases, but an examination shows that in most of them it is used to illustrate the doctrine that in courts of record facts not appearing will be presumed to exist, and their non-appearance will be treated as a mere irregularity, while their absence in cases arising in inferior tribunals will be deemed fatal to the validity of the proceedings. If it appears upon the face of the proceed-

ings that a court of record had no jurisdiction, manifestly it must be as fatal to a judgment as would the absence of the same fact in a court of limited jurisdiction.

We are not now referring to the distinctions made in reference to jurisdiction of the subject-matter in different courts, but to the jurisdiction of the person. The latter, in this state, is gained in ordinary civil actions, in courts of original jurisdiction, through the instrumentality of a summons, except in cases of voluntary appearance. The summons in cases arising in our superior courts is in substance the same as those issued from justices' courts. Each is required to contain the same notice to the defendant, viz., in cases arising on contract for the recovery of money or damages only, that if defendant fails to answer, judgment will be taken against him for the sum claimed, stating it; in other actions, a notice that unless defendant so appear and answer the plaintiff will apply to the court for the relief demanded. Code Civil Proc. §§ 407, 844. Jurisdiction of the person of the defendant is gained alike in the superior and justices' courts by service of the summons. Against his consent, jurisdiction can be gained in no other manner.

The requirements of the summons as to the notice being the same in both courts, if we are correct in our conception of the principle involved, it necessarily follows that if the error complained of appeared affirmatively upon the record of a superior court, to the exclusion of every presumption, it should receive precisely the same interpretation as would be given to it in justice's court. In this view of the case, the question for decision is, was the judgment of the justice's court *void* or only *voidable*? That the notice contained in the summons was defective, and that the judgment was erroneous, and subject to be set aside by the justice or reversed on appeal, is conceded on all hands. It was certainly *voidable*. Was it void? The summons and complaint were properly served upon defendant, he failed to answer, a trial was had, and judgment was rendered against him for \$299, the sum demanded in the complaint and specified in the summons. The court had jurisdiction of the subject-matter of the suit, and if the summons is to be deemed as sufficient to give jurisdiction of the person of the defendant, then the judgment, being such as the justice had a right to render, though irregular and subject to reversal, was valid and binding until directly attacked, and is not subject to review in this collateral proceeding. In *State v. Woodlief*, 2 Cal. 242, the summons required defendant to answer in 30 days, instead of 40, as by statute required, and was in other respects defective, and this court held it was insufficient to support a judgment by default. This case, however, came up by a direct appeal from the judgment, and cannot be considered as concluding a case in which the question arises collaterally. *Porter v. Hermann*, 8 Cal. 619, is to the same effect, and the question arose in like manner. *People v. Weil*, 53 Cal. 253, also came up on appeal, and a like doctrine was maintained.

In *Polack v. Hunt*, 2 Cal. 193, the summons was defective, and the court below permitted it to be amended. On appeal it was urged that the summons did not contain a similar notice to defendant as that now required by the Code, and that the court gained no jurisdiction. This position was overruled, and the action of the court below was approved. In *Ward v. Ward*, 59 Cal. 141, the appeal was from an order vacating a judgment by default entered in an action upon a contract of marriage, and the summons was defective in substantially the same particular as here, and the court say:

"We have no doubt that the entry of a judgment by default, in the absence of a notice in the summons that in case the defendant failed to appear and answer within the time prescribed by law, the plaintiff would take judgment for the sum demanded in the complaint, was, at least, such an irregularity as would justify the court in vacating the judgment."

But, from the cases above enumerated, we can make but little progress in an inquiry directed solely to the validity of a judgment when collaterally attacked. "While it is advisable in all cases to literally comply with the provisions of the Code, nothing short of a substantial departure therefrom can properly be held to be fatal to a proceeding under it. 'Its provisions, and all proceedings under it, are to be liberally construed, with a view to effect its objects and to promote justice.'" *Shinn v. Cummins*, 3 PAC. REP. 133. Such errors as are not prejudicial to parties are to be disregarded everywhere, and those which are prejudicial when committed by a court having jurisdiction to act must be taken advantage of by direct proceedings.

In this case the summons was, save in the one respect, regular. It was served with the complaint. The defendant was thereby apprised of the nature and scope of the action, of the time and place for answer, and the amount or sum of money sought to be recovered. The summons was, we think, so far regular as to confer jurisdiction of the person of defendant upon the court, and make it the duty of the former to combat the proceedings, if he would not be bound by them. It cannot be likened to a case in which there is no service, and in which a defendant may not be aware of the proceedings against him; but is a case of service of an irregular process, which might have been amended because irregular and not void, or might have been set aside by the court from which it issued, or on an appeal, but which could not be entirely ignored; which was, in short, *voidable* and not *void*, and therefore the judgment predicated upon it cannot be attacked in this collateral proceeding. The following cases, though not directly in point, have a bearing on the question: *Dorente v. Sullivan*, 7 Cal. 279; *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Drake v. Duvenick*, 45 Cal. 455; *Freem. Judgm.* §§ 126-135; *Sacramento Sav. Bank v. Spencer*, 53 Cal. 740; *Cloud v. Eldorado Co.* 12 Cal. 134.

2. As to the exemption of the two horses and their harness. Plaintiff was a farmer and had eight work horses, besides a number of colts. His sons managed the farm on shares. One of his sons was

at Folsom with a four-horse team, when defendant, as constable, levied upon and took into possession the two lead horses, and their harness, under an execution regular in form, and against the property of plaintiff. On the sixteenth day of November, 1883, plaintiff served a written notice upon defendant, claiming the two horses and their harness as exempt from execution under subdivision 3, § 690, Code Civil Proc. He did not tender defendant any of the other horses, or any property in lieu of the two horses levied upon. Defendant delivered the horses and harness to plaintiff on the nineteenth of November, 1883, three days after the demand.

Under the third subdivision of section 690, Code Civil Proc., two horses and their harness of plaintiff, a farmer, were exempt from execution. This exemption was a personal privilege of plaintiff, which he could claim or waive at his pleasure. Having more horses than the number exempt by law, plaintiff had a right to elect which he claimed as exempt. It was not incumbent upon him to make the election at the date of the levy, for, so far as appears, he was not present thereat; but it devolved upon him to do so within a reasonable time after notice of such levy. This he did, and six days after the levy gave notice to the officer that he claimed the two horses and their harness as exempt from execution.

In the absence of a showing to the contrary, this notice will be deemed to have been in time. Where the debtor has more of a particular kind of property than is exempt from execution, he may select which he will claim; but in doing so, "according to a preponderance of authorities, the defendant, in claiming the right of selection, must offer to surrender to the officer the other property in his hands subject to execution." *Freem. Ex. § 212; Smothers v. Holly*, 47 Ill. 331; *Bonnell v. Bowman*, 53 Ill. 460. There would seem to be reason in this requirement. We should not lose sight of the beneficial objects of the exemption laws, or do or say aught to abridge the rights secured thereby. On the other hand, the wise provisions of these laws should not be used as a means for unjustly shielding property not exempt from the claims of creditors. It is quite proper to give the debtor a reasonable time within which to make his selection of that which he will claim, but if he does not do so at the time a levy is made, the opportunities and temptations to dispose of property not levied upon, or place it beyond the pale of the law, and then claim as exempt that which has been taken in execution, becomes great, and, if yielded to, may result in a fraud upon creditors. If the exemption is claimed at the time of levy, there being other property of the same kind not claimed, it is reasonable to suppose the officer holding an execution will levy upon that not claimed, and his opportunity to do so shall not be abridged by reason of the claims of exemption being asserted at a later date. We hold, therefore, where, as in this case, the debtor has more property of a particular kind liable to seizure than is exempt from execution, and a writ is levied upon a portion

only thereof, leaving as much as is by law exempt, and thereafter the debtor for the first time claims as exempt the property levied upon, or a portion thereof, and leaving in the hands of the officer a less quantity than is necessary to satisfy his writ, then, and in that case, the debtor, to make good his claim of exemption, must offer to surrender to the officer the other property in his hands of the same general kind subject to execution, or so much thereof as may be necessary to satisfy the writ; and failing to do so, as in this case, he is not entitled to recover against the officer. We limit the rule as above to cases where the judgment debtor has extra property of the particular kind taken, for the reason that the facts of this case do not require us to extend the inquiry to cases where a judgment debtor may have property of a different character subject to execution, and in the consideration of which questions as to the duty of the debtor to assist the officer of the law in ferreting out his property may arise.

The judgment of the court below should be affirmed.

We concur: FOOTE, C.; BELCHER, C. C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(67 Cal. 427)

PEOPLE v. LANGTON. (No. 20,087.)

Filed August 28, 1885.

1. MURDER—PRESUMPTION OF INTENT—INSTRUCTIONS.

It is not error, in a murder trial, to instruct the jury that "a person is presumed to intend what his acts indicate his intention to have been; and if the defendant fired a loaded pistol at the deceased, and killed him, the law presumes that the defendant intended to kill the deceased; and, unless the defendant can show that his intention was other than his act indicated, the law will not hold him guiltless."

2. SAME—DEGREES OF CRIME—DRUNKENNESS OF DEFENDANT.

Drunkenness on part of defendant cannot, in a murder trial, form a legitimate matter of inquiry as between the crime of murder in the second degree and that of manslaughter; for manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation.

In bank. Appeal from superior court, Sierra county.

Van Clief & Herron, for appellant.

The Attorney General, for respondent.

MORRISON, C. J. Defendant was prosecuted for the crime of murder, and was convicted of murder in the second degree. On the trial of the case in the court below, the following instruction was given to the jury:

"Every person is presumed to intend what his acts indicate his intention to have been; and if the defendant fired a loaded pistol at the deceased and killed him, the law presumes that the defendant intended to kill the deceased; and unless the defendant can show that his intention was other than his act indicated, the law will not hold him guiltless."

"Unless the defendant can show that his intention was other than his acts indicated, the law will not hold him guiltless," is the portion of the instruction which struck us at first view as erroneous. It might be claimed that the defendant was required to show, by evidence adduced by himself, what his intention was, even though the fact appeared, from evidence introduced by the prosecution, that there were circumstances of mitigation or facts which reduced the crime, as provided by section 1105 of the Penal Code. But, on reflection, we have concluded that such is not the proper meaning of the instruction. The words "unless the defendant can show" mean, unless he can or does show from the whole evidence in the case; thus bringing himself within the meaning of the above section of the Code. It would be a strained construction of the language of the instruction to hold that the court meant or intended the jury to understand that the evidence must come from the defendant, and that they could not consider the whole evidence in the case as showing circumstances of mitigation or facts tending to reduce the degree of the crime, or even to excuse or justify the same.

The appellant also complains of the second instruction, which is as follows:

"As between murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry, for manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation," etc.

But is it true that drunkenness does form a legitimate matter of inquiry as between murder in the second degree and manslaughter? The trial court told the jury that it did not. The question is not a new one in this court. In the case of *People v. Nichol*, 34 Cal. 215, the court below, charging the jury in a case of homicide, said:

"As between murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry, for manslaughter is the unlawful killing of a human being without malice, express or implied; and without any admixture of deliberation."

The defendant was convicted, and the judgment was affirmed by the supreme court. The instructions were quite numerous, including the one referred to, and, speaking of them, Judge SANDERSON, delivering the opinion of the court, said: "They are not even obnoxious to criticism." In the case of *Pirtle v. State*, 9 Humph. 663, the supreme court of Tennessee says:

"As between the two offenses of murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry. The killing being voluntary, the offense is necessarily murder in the second degree, unless the provocation was of such a character as would at common law constitute it manslaughter, and for which latter offense a drunken man is equally responsible as a sober one."

The case named is cited with approval by the supreme court in *People v. Belencia*, 21 Cal. 544, and the instruction in the case we are now considering is fully sustained by these authorities.

We find nothing in the record which calls for a reversal of the judgment, and therefore the same is affirmed, as is also the order denying a new trial.

We concur: MYRICK, J.; ROSS, J.; THORNTON, J.

(67 Cal. 422)

WILSON v. BARNARD and others. (No. 9,349.)

Filed August 28, 1885.

LOGGERS' LIENS—COMPLAINT—NECESSARY ALLEGATIONS.

No cause of action is stated in a complaint to enforce a logger's lien, under the California act of March 30, 1878, "giving a lien to persons employed in logging camps on the logs cut," unless such complaint alleges that some amount was due from the defendant to the contractor when plaintiff's lien was filed, or that defendant had notice of plaintiff's claim prior to payment to the contractor of the full amount due. *McKEE, J.*, dissenting.

In bank. Appeal from superior court, Butte county.

Gray & Sexton, for appellant.

Gale & Jones, for respondents.

Ross, J. This action was brought to enforce a lien alleged to have accrued under and by virtue of the provisions of the act approved March 30, 1878, entitled "An act giving a lien to loggers and laborers employed in logging camps upon the logs cut and hauled by the persons who employ them," as amended by the act approved April 12, 1880. St. 1877-78, 747; St. 1880, 38.

The first point made for the appellant, which we think must be sustained, is that the complaint does not state facts sufficient to constitute a cause of action. In *Rosenkranz v. Wagner*, 62 Cal. 151, and in other cases in this court, it was held that because of the failure of the complaint to allege that anything was due from defendants to the original contractor when plaintiff's lien was filed, or that defendants were notified or had any knowledge of the claim of plaintiff prior to the payment in full of the amount due to the original contractor under the contract, that there was a failure to state a cause of action. But it is contended on behalf of the respondent that the decisions under the mechanic's lien act are inapplicable to cases arising under the logger's lien act, because by the latter act it is provided that the liens given "shall take precedence of other claims" for the period of 30 days after the logs or lumber arrive at the place of destination, etc. But, manifestly, the giving of precedence of one class of liens over all other claims does not extend the liability of the party against whom all of the liens and claims go; that is to say, the owner of the property sought to be charged. The contracts of material-men and laborers with the original contractor are made with reference to his contract with the owner, and in subordination to its terms. *Dingley v. Greene*, 54 Cal. 336. It results that the owner cannot be charged

beyond the contract price. *Latson v. Nelson*, 11 P. C. L. J. 589; *Whittier v. Hollister*, 12 P. C. L. J. 280.

In the brief of counsel for plaintiff it is said that Barnard & Co., who were the contractors, and who employed the plaintiff to work, "were converting trees on appellant's land into lumber, and, after transporting, scaling, measuring, and marking the same, would, if quality and all things were satisfactory to appellant, receive an agreed price per thousand feet;" and that plaintiff's lien was filed against certain lumber prior to its delivery, and prior to the payment by appellant of the agreed price therefor. The *complaint* contains no such averment with respect to payment, for which reason the demurrer thereto should have been sustained.

Judgment and order reversed, and cause remanded, with directions to the court below to sustain the demurrer to the amended complaint, with leave to the plaintiff to amend further.

We concur: MYRICK, J.; THORNTON, J.; MORRISON, C. J.; McKINSTRY, J.

McKEE, J., (*dissenting*.) I dissent. The action is an attachment suit for recovery of the value of personal services rendered by the plaintiff in cutting standing timber upon land claimed by the defendant Farnham, and in hauling and driving saw-logs and lumber from the land to his saw-mills, and to foreclose a logger's lien. The lien was filed upon a quantity of lumber which the plaintiff had "cut, sawed, hauled, and driven" to a saw-mill on the land of Farnham. This lumber had been cut, etc., by the plaintiff, for and under the directions of the defendants Barnard & Co., who had a contract with the defendant Farnham, under which they were authorized to enter upon Farnham's land and cut the standing timber thereon, for the purpose of converting the same into lumber, which, when "scaled, marked, and measured," Farnham agreed to purchase of them at a certain price per thousand feet, payable when the lumber was delivered, "scaled, marked, and measured" to him at his saw-mills upon his ranch. In the execution of the contract Barnard & Co. hired the plaintiff as a "logger," but they failed and refused to pay him his wages, which amounted to several hundred dollars; and, as security for the payment of what was owing to him, he filed a logger's lien upon the lumber at the loggers' yards on Farnham's ranch, where it lay unscaled, unmarked, unmeasured, and undelivered; and, seasonably after the filing of the lien, he commenced his attachment suit. The lien was filed and the attachment suit commenced under the provisions of an act of the legislature approved March 20, 1878, entitled "An act giving a lien to loggers and laborers." Section 1 of the act reads as follows:

"A person who labors at cutting, hauling, rafting, or drawing logs or lumber shall have a lien thereon for the amount due for his personal services, which shall take precedence of all other claims, to continue for thirty days

after the logs or lumber arrive at the place of destination for sale or manufacture," etc.

It is not claimed that this statute is unconstitutional; nor is it claimed that any of the steps taken by the plaintiff for the creation of the lien is contrary to the requirements of the statute. But, conceding all these the contention is made, that, as Farnham did not owe Barnard & Co. any money on account of the contract under which the lumber was made at the time of the filing of the lien, the plaintiff had no lien to be enforced.

A "logger's lien" is an entirely different thing from a "mechanic's lien." The latter is given by statutory law upon real property of which the person for whom the improvement is made is or claims to be the absolute owner; and, as he contracts under the mechanic's lien law, which enters into his contract for the improvement of his property, he is bound to the extent and according to the terms of his contract, and his property is charged for the payment of the indebtedness contracted to the several parties who, under the law, have rights in it; and he can do no act to impair those rights; therefore he is not bound to pay unless there is money due and owing at the time of availing of those rights. Such were the cases of *Rosenkranz v. Wagner*, *Dingley v. Greene*, *Latson v. Nelson*, and *Whittier v. Hollister*, cited in the prevailing opinion. Here, however, there is no lien claimed or sought to be enforced upon the real property of Farnham. It is a lien upon personal property in which Barnard & Co. had an absolute or qualified ownership; and, for the purpose of the loggers' law and lien, it matters not whether they were absolute or qualified owners,—they were the owners of the property; and, by the terms of the contract between them and Farnham, Farnham merely reserved to himself, as a preferred purchaser, the right to buy from them at a stipulated price when the lumber was delivered at his saw-mills, scaled, marked, and measured. But the lumber was not scaled nor marked nor measured, nor delivered to Farnham. Farnham, therefore, had neither possession of it nor title to it. The lumber was in the actual or constructive possession of Barnard & Co., and the plaintiff, who had expended his labor upon it. A constructive possession is sufficient for a logger's lien; therefore the plaintiff, in my judgment, had an unquestionable right to create and perfect a lien upon the lumber, whether Farnham was or was not indebted to Barnard & Co. at the time. The right to such a lien does not depend upon an indebtedness by the owner of land to persons whom he has authorized to cut and remove timber growing upon it, and to manufacture the same into lumber, by a special contract for that purpose. It rests upon property in the debtor, and possession, actual or constructive, in the lienor. The statute authorizing the lien to be created and filed is but the legislative expression of the common-law right of every working-man to retain possession of personal property upon which he has bestowed labor which has changed the property and increased its

value. Having possession, actual or constructive, the artisan or laborer has the right to retain it or to create a lien upon it, according to the statute, without reference to any contractual relation between his employer and others as to the property. Any claims arising out of such relations are made, by the statute, subordinate to the superior claim and right of the laborer to his lien upon the property for the services which have made it valuable.

I think the judgment of the court for the enforcement of the lien should be affirmed.

(67 Cal. 441)

SHARP v. BLANKENSHIP.¹ (No. 9,152.)

Filed August 29, 1885.

BOUNDARIES—AGREEMENT FOR DIVISION LINE—STATUTE OF FRAUDS.

Where adjoining owners of land have agreed upon a boundary line, upon which a division fence is erected, and acquiesced in and possession held thereunder for a length of time sufficient to create title by adverse possession, the effect will be binding on the parties, and a subsequent parol agreement to run a division line to constitute the boundary is within the statute of frauds, and not binding.

In bank. Appeal from superior court, San Joaquin county.

J. B. Hall and W. L. Dudley, for appellant.

F. T. Baldwin and J. C. Campbell, for respondent.

THORNTON, J. Action of ejectment, to recover a tract of land situate in San Joaquin county. Both parties claim under Charles M. Weber. The land in controversy was parcel of a *rancho* known as the "Campo de los Franceses," of which Weber was the owner. The litigation is in regard to a boundary line between the plaintiff and defendant. The boundary line in controversy is the western line of plaintiff and the eastern of defendant.

There was evidence tending to show that Weber had caused the *rancho* above named to be surveyed and subdivided into sections, the sections being 69 chains and 72 links square,—the side lines of the sections being a little less than 10 chains short of a mile,—and that these sections were subdivided into four quarters, constituting four squares of equal area. There was also evidence tending to show that this boundary line in dispute was marked by stakes set in the ground when the survey of the *rancho* was made by Weber; that the boundary line in dispute was marked by corner posts or stakes that were pointed out to Balch, the grantor of defendant, in 1858 by Weber. This appears to have been done in 1858, when Balch was negotiating with Weber for the land, which was afterwards purchased by Balch

¹ACQUIESCENCE IN BOUNDARY LINE. In *Toby v Secor*, 19 N. W. Rep. 99, the court held, in regard to the question of adverse possession, that if two adjacent or coterminal proprietors agree upon and establish a dividing line between their premises, and actually claim and occupy the land on each side of that line continuously for 20 years, such possession will be *adverse*, and confer a *title* by prescription: following *Bader v. Zeise*, 44 Wis. 96, in which the court rely upon *Ang. Lim.* § 384; *Burrell v. Burrell*, 11 Mass. 293; *Brown v. Cockerell*, 33 Ala. 38; and *Brown v. McKinney*, 9 Watts, 563.

of Weber, and this Weber conveyed to him. The evidence further tended to show that the western boundary line of plaintiff was marked by corner posts or stakes. There was no controversy that plaintiff owned the south-east quarter of section 26, and that defendant owned the portion of the south-west quarter of same section adjoining in its whole length on the west the south-east quarter.

The testimony also tended to show that soon after Balch went into possession, in 1857, he built a fence from corner section post to corner section post on the west line of south-east quarter of section 26; that it remained there until some time in 1877 or 1878, when a controversy arose between plaintiff and defendant as to the boundary line between them; defendant claiming that plaintiff had in his possession, within the fence above mentioned, some of his (defendant's) land. This plaintiff denied, but averred that he did not wish to deprive defendant of any land owned by him. Under this state of things an arrangement was entered into between them by which a surveyor was employed to run the disputed line between them, at their mutual expense. This appears to have been done, and the line as surveyed and run did show that plaintiff's inclosure did contain land that was a part of south-west quarter of section 26, belonging to defendant. Plaintiff insisted that the line was not correctly run, was not on the true line, and there was evidence to show that he never agreed to accept or adopt the line thus run as the true line.

The plaintiff requested the court to charge the jury as follows:

"Although the jury shall find from the evidence that the plaintiff agreed with the defendant in 1877, or thereafter, that the county surveyor should run the line between their respective lands, and such line should become the line on which the division fence should be built, yet, if the jury shall further find that said plaintiff, at any time before the entry of said defendant on the land in suit, refused to accept or adopt the said surveyed line as the true and correct line, the jury must consider the case in the same light as if plaintiff had not agreed to have the line surveyed, and as if no survey had, in fact, been made."

This request was refused, and plaintiff excepted.

It is apparent, from what has been above stated, that the evidence tended to show that the plaintiff derived title to the part of land known as south-east quarter of section 26, the western boundary of which was marked by stakes or posts put in the corners by Weber for that purpose, and that plaintiff took possession and built the fence on this line according to the line so marked. Now, if plaintiff obtained title to and became the owner of the quarter section above mentioned, bounded on the west by a fence between the posts above mentioned, it would be difficult to perceive, under the statute of frauds of this state in force at the time the transactions referred to took place, why he lost it by a line surveyed in the manner above pointed out, to which he never agreed. If the line thus surveyed had been adopted by both parties, and possession taken accordingly, and held for a period of time sufficient to build up a title by adverse posses-

sion, it might be held that the title would have vested in them according to the line so adopted and acted on; but there is no such evidence here. See *Adams v. Rockwell*, 16 Wend. 285, and cases there cited and commented on. Indeed, there is evidence which, if true, proves that the plaintiff never agreed to or adopted the line.

The court erred in refusing this instruction. Nor was the error cured by giving it with the words appended by the court. The words appended are:

"Except so far as the evidence in regard to the agreement of survey may tend to show that there was no acquiescence on the part of Blankenship in the old line."

We cannot perceive that the words appended are at all pertinent to or had any connection with the matter of the request. The latter relates only to a new line, and the former to the old line, which appeared to be and was entirely different from the new. The question whether Blankenship, the defendant, acquiesced in the old line or not, had no connection with the proposition stated in the request in regard to the new line. The request did not tend in any way to take from the consideration of the jury anything in the case bearing on the issue of the acquiescence of defendant in the old line. The words added to the request by the court certainly had a tendency to lead the minds of the jury away from the question which should have been submitted to them, as embodied in the request.

For this error the judgment and order are reversed, and the cause remanded for a new trial.

We concur: MORRISON, C. J.; MCKINSTRY, J.; ROSS, J.; MYRICK, J.

SUPREME COURT OF WASHINGTON TERRITORY.

(2 Wash. T. 447)

SMITH and others v. THE SHIP CHALLENGER and others.

Filed August 5, 1885.

ADMIRALTY—RULE 16—ASSAULTS—ACTION.

Assaults and beatings are within admiralty rule 16, and actions for damages therefor must be brought *in personam* and not *in rem*.

Struve, Haines & McMicken, for appellants and claimants, the ship Challenger and others.

Burk & Haller, for appellees and libelants, Charles Smith and others..

HOYT, J. The amended libel in this cause alleges, in substance, that in the month of May, 1882, the libelants shipped on the Challenger at the port of Philadelphia for a voyage from that place to New Tacoma, Washington Territory,—the libelant Smith shipping in the capacity of third mate, the libelant Matson as carpenter, the libelant Schaeffer as deck boy, and the others as seamen, at the wages specified in the libel; that they signed shipping articles; that the mates of said ship were men of violent temper, and cruel and inhuman dispositions, which fact was at all times known to the master, but not to the libelants until after the commencement of the voyage; that during the whole course of the voyage said libelants, without cause, were wrongfully subjected to beatings, imprisonments, cruelties, and abuse by the mates of said ship, and that the master failed, neglected, and refused to use due diligence to protect the libelants from such acts; and that each of said libelants had been damaged thereby in a certain sum set out in said libel. Then follows an allegation that wages are due said libelants as follows: Warrow, \$37.50; Olander, \$34; Anderson, \$20.25; Herbert, \$50; Ross, \$29.26; Danielson, \$22.70; Francisco, \$33.70; Hanson, \$21.20; Dahlgren, \$28.05; Johnson, \$29.20; Andrea, \$25.20; Matson, \$162.66; and a prayer for those various amounts, in addition to the amount of damages above mentioned. The claimants excepted in detail to all the allegations in the amended libel, except those referring to the shipment of the libelants and the amount of wages due them. These exceptions, 20 in number, were all overruled by the court. Issue was then made upon the allegations of said libel, and the cause heard upon proofs duly taken, and a decree entered against the said ship and her claimants, in favor of each of said libelants, (excepting certain of them who had, pending the action, compromised their claims,) both for damages on account of said ill-treatment and for the wages found due, with costs. And from this decree claimants have prosecuted this appeal.

The question of most importance in the cause, and the one to which counsel have directed most of their argument, is as to the effect of admiralty rule 16, it being contended by appellants that the dam-

ages claimed for in this libel, by reason of said rule, could not be enforced against the ship, even although her owners might be liable in a suit *in personam*. While the appellees insist that though said rule bars an action against the ship for an assault and battery as such, yet it has no application to claims of the kind set out in their libel, which are for a breach of the contract, for protection and fair treatment, implied in the contract for service, by reason of certain assaults and beatings, and not an action to recover directly for damages from such assaults and beatings. Said rule 16 reads as follows:

"In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only."

It is conceded that the supreme court had the power to adopt this rule. It follows that it must be given such a construction as will give force to the words therein used, and meet the object for which it seems to have been adopted.

What, then, was the situation before this rule was promulgated as to the liability of the ship for damages of this nature? Was she liable for every act of assault or beating committed on board of her, or was she liable only when such assaults or beatings were made under such circumstances as to constitute a violation of the contract, or duty of protection and fair treatment? We think the latter; as, in our opinion, the only remedy the injured party on shipboard, as elsewhere, ever had for a single willful assault, as such, was an action *in personam* against the person who inflicted the injury; and it seems to us that without such rule it could never have been held that either the ship or her owners were liable in any form of action, from the simple fact that one person upon said ship had committed a willful assault upon another, as we think that the only ground upon which one far away from and in no way connected with such assault could be held liable, would be that he had in some way violated his contract, either express or implied, with such injured party.

To give the construction to said rule contended for by appellees would, in our opinion, entirely nullify it, and leave the matter just where it was before its adoption. Without it, the action could be *in personam* only in all cases where the ship was not liable, and we do not see how either she or her owners could be held thus liable for damages of this nature on other grounds than that the allowing of the same was in violation of some duty imposed by contract, or in consequence of negligence in the performance of some duty enjoined by law, and it is just for such violations or neglect that appellees claim the right to recover herein.

If, however, said rule is construed as contended for by appellants, it becomes at once of vital force, for it says to the person who has had his contract for protection violated by assaults or beatings that though he could before have proceeded against the ship, he must now content himself with a suit *in personam*.

We are not discussing the wisdom or justice of said rule, as these questions address themselves only to the power that made it. We suppose that it was thought necessary in the interest of commerce to prevent the frequent attachment of vessels at ports far away from home for liabilities which could not have been contemplated, and for which, therefore, no preparations could have been made, and that public interest demanded that occasional individual injustice should be suffered, rather than that commerce should be so inconvenienced and obstructed. It is true that in many cases, as in that at bar, great hardship and injustice may be done by compelling the injured party to go to the home of the owner to obtain redress; yet, in most cases where there has been really serious abuse, the damages recovered will be such as to warrant such a course, and, on the whole, the injustice may not be greater than to compel such owner to meet the tying up of his ship at any port, however remote or small, that she may chance to visit, upon every allegation, real or pretended, that, by assault or beating, the said contract had been broken. This construction is strengthened by the language of the rule, for had the intention been to provide a remedy for an assault and battery, as such only, the words "assault or beating" were not the most appropriate; while, if the intention was to cover all cases of actionable personal abuse, as well those that were as those that were not violations of such contract, no more apt words could have been found to express such intention. Besides, the rules, of which this under consideration is one, have substantially covered the entire field of maritime jurisdiction, and have pointed out the proper proceeding in all, or nearly all, classes of cases,—authorizing certain claims to be enforced *in rem*, certain *in personam*, and, again, others by either or both of such remedies. And if it had not been the intention by this rule to indicate the procedure in all cases of liability growing out of assault and battery, there would have probably been another rule for the class of liabilities not so provided for.

We see nothing to induce us to hold that, having had its attention called to this matter of assault and beatings, the supreme court would have provided by rule for one class of liabilities arising therefrom, and left another class without any rule for its government. The rule, fairly interpreted, is broad enough to cover all cases the *gravamen* of which is an assault or beating, and we think that such should be its construction. To construe it otherwise would allow damages growing out of an assault or beating in one form of action to be enforced against the ship, while the same elements of damage in another form of action would not be so enforced, and this would overturn a well-established principle in admiralty, that substance and not form is the thing to be considered. But appellees insist that even if this rule is construed as above stated, yet it does not have these claims, as the injuries alleged are not those arising from assaults and beatings only, but also include those arising from much

other ill treatment. We think, however, that the principal element of alleged damages is for injuries received by assaults and beatings, and that these claims must be held to be within said rule. We have discussed this question upon the language of said rule, and the circumstances of its adoption, rather than in the light of authority, as it was conceded upon the argument that but little light can be found in the books upon this subject. Such light, however, as is shed by the authorities, both negative and positive, upon this subject seems to favor the construction given above. A large number of cases have been brought to recover for this class of damages, and have, with a single exception, been prosecuted *in personam*, while in the single case, where an attempt was made to hold the ship, the ruling of the court was that she was not liable. See *The Guiding Star*, 1 Fed. Rep. 347. It is, of course, true that the negative authority above mentioned is entitled to but little weight, for it may have been out of abundant caution only that attorneys have always prosecuted *in personam* instead of *in rem*; yet when we consider the manifest advantages in many cases of the proceeding *in rem*, we must conclude that the fact that it has never been resorted to shows pretty conclusively that the bar of the country had construed such rule as a bar to the proceeding *in rem*.

The damages claimed for could not, then, be recovered in this action, and should have been stricken from the libel. Appellants do not question the decree of the court below for wages due the several libelants, but claim that there should have been no allowance of costs; the proof showing, as they allege, that they had before suit made a full tender of such wages; but as the lower court seemed to think that a sufficient tender had not been shown, we are not disposed to disturb the finding for costs in favor of appellees in the court below, as it does not sufficiently appear that they were wrongfully allowed.

There must be a decree entered here in favor of libelants for the wages found due, and for costs incurred in the lower court, from which must be deducted the costs of this appeal, which are allowed appellants.

WINGARD and TURNER, JJ., concur.

(2 Wash. T. 422)

KENYON v. KNIPE and others.

Filed August 5, 1885.

DEED — ACKNOWLEDGMENT — SEAL OF COUNTY AUDITOR — EVIDENCE — CURATIVE STATUTE.

Without deciding whether a deed, acknowledged before the auditor of a county and not authenticated by his official seal, is void, *held*, that the defect in the acknowledgment of the deed offered in evidence and ruled out by the court in this case, if any defect there was, was cured by the act of the legislature of Washington Territory, approved November 10, 1873: and that the ruling of the court was erroneous, and that the judgment must be reversed, and the cause remanded for further proceedings.

A. L. Palmer and G. T. Thom, for appellant, *J. Gardner Kenyon. Burk & Haller and C. H. Hanford*, for appellees, *Robert Knipe and others*.

TURNER, J. This action was brought by the appellant in the court below to abate an alleged nuisance erected and maintained, by the appellees on the frontage to property of the appellant known as lots 6 and 7, in block B., in A. A. Denny's addition to Seattle, which property abuts on the waters of Elliott's bay, an arm of the sea. Said lots 6 and 7 abut on and extend below the line of high tide, and the wharf and other structures alleged to be a nuisance are erected between the line of low tide and deep water, directly in front of said lots 6 and 7.

The appellees denied the material allegations of the complaint, and pleaded several affirmative defenses, and to the affirmative defenses the appellant replied. After hearing, the judgment of the court below was for the appellees, and the cause is brought to this court by appeal. Upon the trial below the appellant offered in evidence, to prove his title to the property in dispute, a deed from A. A. Denny and wife, executed in 1867. Objection was made to the introduction of this deed in evidence, because the acknowledgment of the deed, made before the auditor of King county, was not authenticated by the official seal of that officer. The court sustained the objection, and the deed was rejected. To this ruling the appellant excepted, and his exception was allowed.

Without deciding whether a deed acknowledged before the auditor of a county, and not authenticated by his official seal, is void, we hold that the defect in the acknowledgment of this deed, if there was any defect, was cured by the act of the territorial legislature, approved November 10, 1873, entitled "An act curing defective acknowledgments." Laws Wash. T. 1873, p. 481.

We think the cause must be returned to the lower court for this error. The most important question presented by the affirmative defenses hinge upon the recitals of the deed, which was excluded from the evidence. And as to all of the questions we doubt whether this initial error did not operate to prevent a full and fair investigation in the court below.

The judgment of the court below is reversed, and the cause remanded for further proceedings.

WINGARD and HORT, JJ., concur.

(2 Wash. T. 420)

SAYWARD v. GUYE and another.

Filed July 17, 1885.

APPEAL—SERVICE OF NOTICE—TRANSCRIPT—DISMISSAL.

Appeal dismissed, because it is not made to appear that notice of the appeal was ever made or filed with the clerk of the court in which the judgment appealed from was entered; following *Crawford v. Haller*, 2 PAC. REP. 353.

Appeal from district court, Seattle, W. T.

Struve, Huines & McMickin, for appellant, W. P. Sayward.

Burk & Haller, for appellees, F. M. Guye and another.

HOTT, J. Appellees having in their brief properly reserved the right so to do, now move the court to dismiss the appeal herein, because it does not appear that notice of the appeal was ever made or filed with the clerk of the court in which the judgment appealed from was entered, and cites in support of said motion the ruling of this court in the cause of *Crawford v. Haller*, 2 PAC. REP. 353, made at the July term, 1883, and it is claimed by them that the said notice of appeal has the same and no other authentication as the one in the case above cited, and that if that decision is to be adhered to, then there is no proof in this cause that any notice of appeal was ever given or served herein; and this position is practically admitted by the appellants. We have, moreover, looked into the record in the two cases, and we find them to be identical in regard to the matter involved in this question; and as we are satisfied with the ruling then made, it follows that it will be adhered to, and this court will hold now, as then, that this transcript furnishes no proof that the cause has ever been brought to this court.

In the case of *Crawford v. Haller*, above cited, the court, upon cause shown, gave the appellants leave to supply proof of the facts necessary to show jurisdiction in this court, and in view of the fact that the question at issue had not before been decided by this court, and of the other circumstances of that case, much indulgence was probably merited. But here a different case is presented. Appellant presents such a transcript as this court has held to be insufficient to show jurisdiction, and when his attention is called to the particulars wherein such transcript is insufficient by the brief of opposite counsel, and to the cause in which this court has so held, he still rests his case upon such faulty transcript, instead of taking steps to perfect the same, as he might easily have done by causing the clerk to file in this court a properly authenticated copy of the notice of appeal in said cause. We can therefore in this cause extend a like indulgence to the appellant only by approving of the acts of a party in thus relying upon what he is duly notified has been held thus faulty, with the expectation that if the court again holds the same as it has before, it will allow him time, as a matter of pure grace, to do that which he could have easily done, and ought in common prudence to have done, as soon as his attention was called thereto; and

this we are not willing to do. It is therefore our opinion that the appeal herein should be dismissed; and it is so ordered.

TURNER and WINGARD, JJ., concur.

(2 Wash. T. 354)

COLLINS v. CITY OF SEATTLE.

Filed July 17, 1885.

1. APPEAL—CERTIFICATE OF JUDGE.

Where an appeal is taken under the act of the legislature of Washington Territory, and there is no certificate of the judge to the statement of facts that said statement contains *all* the material facts in the cause, nor the material facts in the cause, a motion to strike it from the record will be sustained.

2. SAME—ASSIGNMENT OF ERROR—SERVICE.

Where no service of the assignment of errors has been made upon the adverse party or his attorney, and the paper claimed to be an assignment of errors cannot be so considered, a motion to affirm will be allowed.

McGilvra & Burke, for plaintiff in error.

C. H. Hanford, for defendant in error.

WINGARD, J. The appeal to this court was taken under the act of 1883. There is no certificate of the judge to the statement of facts that said statement contains *all* the material facts in the cause, nor the material facts in the cause. The motion to strike it from the record is therefore sustained. There is no assignment of errors in this case served upon the adverse party or his attorney, nor can the paper claimed to be such assignment be considered as a paper in the case. The motion to affirm the judgment is therefore allowed.

For the reasons given in *Wilson v. Wald*, *infra*, announced this morning, July 17, 1885, we think there has not been a general appearance in the cause.

HOYT and TURNER, JJ., concur.

(2 Wash. T. 376)

WILSON v. WALD and another.

Filed July 17, 1885.

1. WRIT OF ERROR—ACTION AT LAW—APPEAL DISMISSED—CODE WASH. T. 1881.

An action at law can be brought to the supreme court for re-examination only by writ of error.

2. SAME—SUPREME COURT RULE 17—NOTICE.

Where the appellees in their brief call attention to the nature of the action, and to the character of the process by which the case is brought to the supreme court, and notify appellant that they will move to dismiss the appeal, this is a sufficient compliance with supreme court rule 17.

McNaught, Fery, McNaught & Mitchell, for appellant, W. E. Wilson.

Hall & Smith, for appellees, Wald and another.

TURNER, J. This is an action at law. It was brought to this court

from the court below by appeal taken under the provisions of the Code of 1881. The appellees now move to dismiss the appeal, on the ground that an action at law can be brought to this court for re-examination only by writ of error. The motion seems to us well grounded. It is contended by the appellant, however, that the appellees, having filed a brief in the cause in this court, without having given notice of a special or limited appearance, as provided for by rule 17 of the court, are now precluded from taking the objection.

The appellees in their brief call attention to the nature of the action, and to the character of the process by which the action is brought to this court, and before addressing themselves to the merits give the following notice:

"And appellees here give notice that they will move the supreme court to dismiss the appeal, for the reasons stated, which motion will be filed on or before the second day of the July term, 1885."

We think the notice thus given a sufficient compliance with the rule of the court in question. The appellant and the court are notified, contemporaneously with the filing of the brief, that the appellees intend to insist upon the objection to the jurisdictional process. This is what the rule was intended to accomplish. The notice thus conveyed is not in the form usually employed to limit to a special appearance what would otherwise amount to a general appearance, but form, while useful and proper to be observed, is not considered essential. The appeal is dismissed.

WINGARD and HOYT, JJ., concur.

(2 Wash. T. 402)

LEWIS v. HART.

Filed July, 1885.

WRIT OF ERROR—CERTIFYING TRANSCRIPT—FILING BRIEF.

Writ of error dismissed, because the transcript was not well certified to the supreme court as a complete transcript, and because the brief of plaintiff in error was not filed within the time prescribed by supreme court rule 10.

Error to First district.

Thos. C. Griffiths, for plaintiff in error.

GREENE, C. J. This cause comes on to be heard upon the printed brief of plaintiff in error, defendant in error not appearing. Looking into the transcript we find it is not well certified to this court as a complete transcript. For this reason the writ of error must be dismissed.

There is also another ground for dismissal, namely, that the brief of plaintiff in error was not filed within the time prescribed by rule 10 of this court. Dismissed, at costs of plaintiff in error.

HOYT and TURNER, JJ., concur.

(2 Wash. T. 412)

E. C. MEACHEM ARMS CO., a corporation, v. SWARTZ and others.

Filed July 24, 1885.

FRAUDULENT CONVEYANCE — BILL BY ATTACHING CREDITOR BEFORE JUDGMENT TO SET ASIDE.

A bill to enjoin the foreclosure of a chattel mortgage, and to set it aside as a fraud on the mortgagor's creditors, may be maintained by an attaching creditor before judgment.

Foster & Houghton and Binkley & Taylor, for appellants, **E. C. Meachem Arms Co.**, a corporation.

Nash & Kinnaird, W. N. Murray, and M. T. Harlson, for appellees, **Elizabeth L. Swartz** and others.

WINGARD, J. The appellants brought an action in the district court (Fourth district) against Emanuel L. Swartz, and an attachment was issued and levied upon his stock in trade at Spokane Falls, Spokane county, Washington Territory. Swartz had previously executed and delivered to his wife, Elizabeth L., a chattel mortgage, purporting to cover all his property, and said Elizabeth L. had commenced proceedings to foreclose said chattel mortgage when the attachment was levied. The sheriff was in possession of the mortgaged property. Appellants applied to the district court and obtained an injunction restraining the mortgagee, sheriff, and all others from foreclosing said mortgage, and setting up that the mortgage was fraudulent and void, without consideration, for the use and benefit of the mortgagor, and that it was a scheme and contrivance entered into between Swartz and his wife to hinder, delay, and defraud his creditors; that the property mortgaged was all the property owned by Swartz, and that if the same was sold upon foreclosure the appellants would be without remedy to collect their claim; and they prayed that the injunction be made perpetual, and the mortgage be declared void and not a lien. Separate answers were filed by the appellees, but both, either by express admission or a failure to deny, admit the making and attempt to foreclose the mortgage; admit the attachment by plaintiffs; admit the debt due from Swartz to them; and that he had no other property subject to execution, as set forth in the complaint. Strong, Hackett & Co. consented to be made parties plaintiff, and it was so ordered by the court. When the cause came on for hearing the appellants moved for judgment on the pleadings, which motion was overruled. The appellees then moved to have the bill dismissed, whereupon the plaintiffs below asked leave to file a supplemental bill alleging that since the filing of the original bill they had prosecuted their suit to final judgment. This leave was denied by the district court. The bill was then dismissed by the court, to which action of the court the appellants excepted.

It is contended by the appellees that the bill for injunction, etc., being a suit in equity, could not be maintained to set aside a fraudulent mortgage by an attaching creditor before judgment. We think the

appellants had a right to file the supplemental complaint, which they asked leave to file under section 114 of the Code of this territory, and had this been done the contention of the appellees in this regard would have been eliminated. Moreover, the jurisdiction of the district court to entertain the bill for injunction is expressly given by section 1997 of the Code. "Fraud is one of the primary subjects of equity jurisdiction." Equity does that which right and reason, and good faith and good conscience, demand in the case. If the appellants in such a case as this should be obliged to await their judgment at law, the law would furnish no adequate remedy,—reason would be disregarded and right annulled. *Hahn v. Salmon*, 20 Fed. Rep. 801; *Robert v. Hodges*, 16 N. J. Eq. 299; *Heyneman v. Dannenberg*, 6 Cal. 376, 380; *Ward v. McKenzie*, 33 Tex. 316; *Perkins v. Fourniquet*, 55 U. S. (14 How.) 314; *Drake*, Attachm. § 225; *Bump, Fraud. Conv.* 524; *Williams v. Michenor*, 11 N. J. Eq. 520.

Let the judgment of the district court be reversed, and the cause remanded for further proceedings.

GREENE, C. J., and HOYT, J., concur.

(2 Wash. T. 466)

COOMBS v. DAVIS and another.

Filed July 23, 1885.

GARNISHMENT—NOTES AND CONTRACTS HELD AS SECURITY BY GARNISHEE—ORDER TO DELIVER TO SHERIFF—CODE WASH. T. §§ 182, 183.

Where a garnishee admits that he holds certain notes and sewing-machine contracts, payable *in futuro*, which have been indorsed and delivered to him by the principal defendant, but claims that they were transferred to him as security for a loan made by him to the defendant, and the evidence leaves the *bona fides* of the transaction in doubt, it is error for the court to make an order requiring the garnishee to deliver the notes and contracts to the sheriff to be collected by him, and the proceeds to be applied to the satisfaction of any judgment that might be recovered against the principal defendant, and the residue to be returned to the garnishee; but the court should require the garnishee to turn the notes and contracts over to the sheriff, upon being paid the sum for which they were held as security.

T. J. Anders, for appellant, Mary E. Coombs.

Allen, Crowley & Thompson, for appellees, A. L. Davis and another.

TURNER, J. The appellant, as garnishee in the case of *A. L. Davis & Son v. W. L. Coombs and others*, pending in the district court for the First judicial district, holding terms at Walla Walla, was required to appear before the judge of said court at chambers, as provided by section 182 of the Code, to answer concerning property in her possession, or under her control, belonging to the defendants, or either of them, or in which they, or either of them, had any interest. Upon the examination before the judge which followed, the appellant admitted having in her possession notes and sewing-machine contracts to the amount of over \$5,000, which had been indorsed and delivered to her by the defendants, as security for the sum of \$3,500, which

she testified she had loaned them on September 28, 1883. In response to questions, upon the direct and cross-examination, she made a detailed statement of facts for the purpose of showing the manner in which she acquired the large sum claimed to have been loaned by her to the defendants, who were her husband and sons, and concerning her and their relations with the plaintiffs and their family. This detailed statement was not consistent in every respect, and tended very strongly to impeach the *bona fides* of the transfer to her of the notes and machine contracts. Upon this state of facts the judge below made an order requiring the garnishee to deliver the said notes and machine contracts to the sheriff, the same to be collected by him, and the proceeds to be applied to the satisfaction of any judgment that might be recovered by plaintiffs against defendants, and the residue to be returned to the garnishee. The garnishee excepted to this order.

The cause is here under the appeal act of 1883, and the appellant, the garnishee, assigns said order as error. Section 182 of the Code, after providing for the examination of garnishees in attachment proceedings before the court or judge, or a referee, continues:

"The court or judge may, after such examination, order personal property capable of manual delivery to be delivered to the sheriff, on such terms as may be just, having reference to any liens thereon, or claims against the same, and a memorandum to be given of all other property, containing the amount or description thereof."

It was not intended by this section of the Code to establish an adversary proceeding in which the title to property in the hands of a garnishee, and claimed by him, might be disputed and litigated. The right of the court or judge in such a proceeding depends entirely upon the admissions of the garnishee. If he admit the property in his hands to be the property of the defendant, free from claim on his part, the court may order the delivery of the property to the sheriff to answer any judgment that may be recorded against the defendant. If he admit the property to be that of the defendant, coupled with a claim or lien against it in his favor, the court or judge may still order the property delivered to the sheriff on such terms as may be just, having reference to the claim or lien of the garnishee. The proceeding is one to probe the conscience of the garnishee by an examination under oath, when his unsworn memorandum, provided for by section 183 of the Code, proves unsatisfactory to the plaintiff, and in the nature of discovery in aid of the right of action against the garnishee, given by section 181 of the Code. This construction is reasonable, and it obviates grave constitutional questions which any other construction would require to be met.

From these views it follows that the order of the judge in the proceeding below was in excess of his authority. Upon the case as made there was only one order that would have completely and certainly protected the rights of the garnishee. That was to require her to turn the notes and contracts over to the sheriff upon being paid the sum

for which she held the same as security. The sewing-machine contracts, as we understand them, are contracts by third persons to pay the defendants money at a future time. Extreme diligence is required in the collection and enforcement of demands such as these notes and contracts are; and as the garnishee is not protected by bond, it would be unjust to require her to stand idly by and rely for their collection upon the exertions of a third person. As to some kinds of property, an order requiring the delivery of the same to the sheriff, and making proper provision for the satisfaction of the prior lien of the garnishee out of the money received from the sale of the same, would doubtless be just. As to property of the character of that in controversy such an order is not just, as that term is used in the statute.

The order of the court below is reversed, and the cause remanded for further proceedings.

GREENE, C. J., and HOYT, J., concur.

(2 Wash. T. 362)

PARKER v. D'ACRES.

Filed July 14, 1885.

APPEAL—ACT WASHINGTON TERRITORY 1883—SUPREME COURT RULE 5—FAILURE TO SERVE COPY OF ASSIGNMENT OF ERRORS.

Where an action at law is appealed to the supreme court under the provisions of the act of 1883, and plaintiff in error fails to serve a copy of the assignment of errors on the adverse party within 20 days after the entry of the motion for appeal in the journal of the district court, as required by supreme court rule 5, the appeal will be dismissed.

Error to First district. Motion to dismiss appeal.

A. E. Isham, for plaintiff in error.

B. L. & J. L. Sharpstein, for defendant in error.

GREENE, C. J. This cause has been brought here under the provisions of the appeal act of 1883, which allow all cases, of whatever jurisdiction, to be taken to this court by the simple service of a notice of appeal given and entered in the lower court. The uniformity of mode of procedure prescribed by that act does not do away with the essential distinctions between causes at law and causes in equity for purposes of review. Rule 5 of this court, in view of these distinctions, and to facilitate the business of the court, and to harmonize the appellate practice under the act of 1883 with that under the Code, has provided, in substance, that in all law causes brought up under the act of 1883 an assignment of errors shall be made in writing, and filed with the clerk of the proper district court, to be certified to this court as a part of the record, and that a copy of such assignment shall be served on the adverse party within 20 days after the entry in the journal of the district court of the notice of appeal. Plaintiff in error did not serve a copy of assignment of errors in this cause within the time limited, and on that ground defendant in error moves to dis-

miss the appeal. No good reason for denying the motion appears. Doubtless rule 5, ever since its adoption, has been part of the law applicable to suitors in this court, without regard to when it first was published in print.

Let the motion to dismiss the appeal be granted.

HOYT and TURNER, JJ., concur.

(2 Wash. T. 402)

WINGARD v. JAMISON and another.

Filed August 4, 1885.

INJUNCTION—RESTRAINING EXECUTION—RES ADJUDICATA.

Demurrer to complaint in proceeding for an injunction to restrain execution on judgment sustained; as, in the original suit in which the judgment was rendered, the same subject-matter was litigated that is sought to be litigated in the injunction proceeding, and no facts justifying the vacation of the result of the former suit, or a reopening of its issues, were set out in the complaint.

P. P. Carroll, for appellant, Isaac Wingard.

Struve, Haines & McMickin, for appellees, Barbara Jamison and another.

GREENE, C. J. Appellant filed his complaint in the district court to enjoin the execution of a judgment recovered against him by the appellee Jamison and her husband, now deceased. A general demurrer was interposed by the appellees as defendants. The demurrer was sustained, and judgment thereupon duly rendered against the plaintiff.

From the complaint we find that the appellee Claughton is the sheriff holding the execution on the original judgment, and that in the original suit the very same subject-matter was litigated that is now sought to be litigated in this; but we do not find any facts set up which would justify a court of equity in vacating the result of the former suit, and reopening any of its issues. A demurrer to such a complaint ought to be sustained. 1 High, Inj. (2d Ed.) §§ 114, 165, 166, and notes; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Hendrickson v. Hinckley*, 17 How. 443.

The judgment below is affirmed.

WINGARD and TURNER, JJ., concur.

(2 Wash. T. 426)

SPARKS and others v. BROWN and others.

Filed August 4, 1885.

EQUITY—REVIEW OF FINDING OF FACT BY COMPETENT TRIBUNAL—FRAUD—MISTAKE.

A court of equity has no power to review a finding of fact made by a competent tribunal, unless the finding is impeached for fraud or mistake.

Appeal from Second district.

Williams, Durham & Thompson, for appellants, Jerusha Sparks and others.

Rufus Mallory and B. F. Dennison, for appellees, Harriet H. Brown and others.

GREENE, C. J. The main decisive question, we think, in determining whether the district court erred in sustaining appellees' demurrer is one as to the power of a court of equity to review a finding of fact made by a competent tribunal. We consider the doctrine to be well established that such a review cannot be had unless the finding is impeached for fraud or mistake. *Hosmer v. Wallace*, 47 Cal. 461; *Wilcox v. Jackson*, 13 Pet. 469; *Shepley v. Cowan*, 91 U. S. 330; *Moore v. Robbins*, 96 U. S. 531; *Quinby v. Conlan*, 104 U. S. 420; *Steel v. Smelting Co.* 106 U. S. 450; S. C. 1 Sup. Ct. Rep. 389. Whether there was a selection of land for military purposes under section 9 of the donation act, and whether any part of the Bolen donation claim was within one mile of such a tract so selected, are mixed questions of law and fact. *River Bridge Co. v. Kansas Pac. Ry. Co.* 92 U. S. 318. The secretary of the interior had undoubted jurisdiction to determine them. No fraud or other cause of impeaching his findings appears in the bill of complaint. True, the bill as originally framed contained several allegations of fraud, which were stricken out on motion. But the fraud so endeavored to be charged, if it ever existed, presumably supervened prior to the contest in the land department, and was available in appellants' interest before the secretary. Langford's fraud, if any, was in 1863; Halstein's, in 1865; that of Brown and husband, of the same dates; and no fraud has been well laid as against Hidden. All the appellees are alleged to have been parties to the contest. The allegations of fraud, therefore, were properly stricken from the pleading; for the secretary must be deemed to have found no fraud. He had before him for adjudication the very subject-matter here proposed to be litigated, namely, the validity of Bolen's donation entry, and his decision as to every question of fact involved could not be modified or reversed by any other tribunal in a collateral suit or proceeding, save for fraud or mistake inherent in itself. See opinion in *Wingard v. Jamison*, ante, 863, decided at this term, and cases therein cited.

The judgment of the court below is affirmed.

WINGARD and TURNER, JJ., concur.

SUPREME COURT OF UTAH.

(4 Utah, 197)

RUSSELL and others v. HARKNESS.¹

Filed September 11, 1885.

CONTRACT—CONSTRUCTION OF.

Examination of a contract entered into at the time of the transfer of possession of a steam-engine, in order to gather from it the intent of the parties as to payment, and the legal *status*, meantime, of the subject-matter.

Bennett, Harkness & Kirkpatrick, for plaintiff.

Kimball & Heywood, for defendant.

ZANE, C. J. It appears from the findings of the district court that on the second day of October, 1882, the plaintiff entered into the following contract with Phelan & Ferguson:

"On or before the first day of May, 1883, for value received in one sixteen horse power engine and boiler, No. 1,026, and a portable saw-mill, complete, No. 127, bought of L. B. Mattison, agent of Russell & Co., we, or either of us, promise to pay to the order of Russell & Co., Massillon, Ohio, three hundred dollars, payable at Wells, Fargo & Co.'s bank, Salt Lake City, Utah territory, with ten per cent. interest per annum from October 1, 1882, until paid, and reasonable attorney's fees, or any costs that may be paid or incurred in any action or proceeding instituted for the collection of this note or enforcement of this covenant.

"The express condition of this transaction is such that the ownership or possession of said engine, boiler, and saw-mill does not pass from the said Russell & Co. until this note and interest shall have been paid in full, and the said Russell & Co., or their agent, has full power to declare this note due, and take possession of said engine, boiler, and saw-mill, when they may deem themselves insecure, even before the maturity of this note; and it is further agreed, by the makers hereof, that if said note is not paid at maturity, that the interest shall be two per cent. per month from maturity hereof till paid, both before and after judgment, if any should be rendered. In case said engine, boiler, and saw-mill shall be taken back, Russell & Co. may sell the same at public or private sale without notice, and apply the proceeds on the note, or they may, without sale, indorse the true value of the property on this note; and we agree to pay on the note any balance due thereon after such indorsement as damages and rental of said machinery. As to this debt we waive the right to exempt or claim as exemption any property, real or personal, we now own, or may hereafter acquire by virtue of any homestead or exemption law, state or federal, now in force, or that may hereafter be enacted."

The court also found that plaintiffs were, at the time of the contract, the owners of the engine, boiler, and saw-mill described above, and another engine, boiler, and saw-mill, all described in the complaint, and that they were of the agreed value of \$4,988 at the date of the contract, a small portion of which was paid in cash; that Phelan & Ferguson gave seven notes for the remainder, due on the first days of May, August, and November, 1883, and the first days of May, August, and November, 1884, and February 1, 1885; that each of the notes was in the same form as the above, differing only in amount,

¹Affirmed. See 7 Sup. Ct. Rep. 51.

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date of maturity, and in description of the property; that Phelan & Ferguson took possession of the property in Idaho, where it was at the date of the contract, and remained in possession until the second day of December, 1882, and then sold and delivered the same to the defendant in part payment of an indebtedness due him and one Longsdorf. The court also found that defendant knew, at the time he received the property, that it had not been paid for by Phelan & Ferguson, and that plaintiff claimed title thereto; that Phelan & Ferguson were, at the date of their contract, residents of Idaho; that the value of the property on the second day of December, 1882, was \$1,600, and that nothing had been paid on the notes. It also appears there was a chattel mortgage act in Idaho, which, among other things, provided that chattel mortgages should not be valid, except between the parties, unless made, executed, and recorded in conformity with that act, and that no such mortgage was executed to the plaintiffs.

The defendant insists that the terms and conditions of the contract manifest an intention to create a secret lien on the property, and should be construed to be a chattel mortgage, and invalid, because not executed and recorded according to the Idaho statute. The plaintiff claims that the intention was, as shown by the contract, that plaintiff should retain the title unless payment should be made according to the terms of the notes, and that the purchaser should have a right to the possession and use of the property until the seller should feel insecure, or until default in payment. The intention of the parties, as expressed in the contract, evidently was to give to the purchaser the possession and use of the property until the seller should feel insecure for reasonable cause, or until payment according to the notes. In the latter case the purchaser was to have the title also, and, in case of default in payment, the right to have the proceeds of the sale, or the value of the property, credited on the notes; and the seller was to have the price, with interest, according to the notes, and, for security, the title with the possession of the property, if he felt insecure for reasonable cause, and the further right to sell the property, and to credit either the proceeds or the value of the property without sale, and also the right to collect the difference and retain the same as damages in case the proceeds should be less than the amount due.

By this contract the vendor expressly retained the title to the property. This right cannot be likened to a lien. A lien is a claim which one person has on the property of another as a security for some debt or charge. "It is not in strictness either a *jus in re* or a *jus ad rem*; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing; it more properly constitutes a charge upon the thing." Nor can it be construed as a mortgage. A mortgage is made by the person having the property or title to another for security. *Heryford v. Davis*, 102 U. S. 235, cited by defendant's

counsel, was a sale of certain cars to a railway company in Missouri. The contract, in some respects, is like the one in hand; in others, not. The parties to it characterized the transaction as a loan of cars for hire, when it clearly was not. The notes executed were all due within four months. This contract gave a much longer time. In that case collateral security in hands to a larger amount than the notes secured was taken, and in the receipt given the seller acknowledged that he received the bonds as collateral security for the notes given in payment for the property. In this, no collaterals were taken. And by the contract in the case cited, the proceeds of the sale, in case they exceeded the notes, were to be paid to the purchaser. In this, the vendor retained such surplus as damages. In the case cited, the court held that the contract passed the title to the purchaser; that it did not amount to a lease or a conditional sale; and that it was invalid as a mortgage. *Hervy v. Rhode Island Locomotive Works*, 93 U. S. 664, a case taken up from Illinois, involved the construction of a contract similar to that in the case of *Heryford v. Davis*, *supra*. This contract also professed to be a lease; but the court held that it clearly was not, but did not determine whether it was a conditional or an absolute sale. The court followed the decisions of the courts of Illinois in construing the chattel mortgage act of that state, and held the contract invalid as to third parties obtaining interests in property under the purchaser. The contract in the case of *Call v. Seymour*, 40 Ohio St. 670, is more analogous to the contract in hand, except that it did not give the vendor authority to credit the value of the property on the notes without a sale, or to collect as damages the difference, if any, between the proceeds or value of the property and the amount of the notes. The court held that the contract constituted a conditional sale, and was binding upon the vendee, and all persons acquiring an interest in the property under him.

Russell & Co. were the owners of the property with respect to which this contention has arisen. They sold upon condition that they were to retain the title unless the consideration should be paid at the times agreed upon, and the possession was given to the purchaser. It differs from a contract in which the parties agree that the creditor shall take the title as security, the debtor retaining the possession. The possession remains the same. Possession and its change involve actions and are accompanied with circumstances which do not attend the mere change of title and ownership without possession. The presumption of ownership from former possession and title is added to the presumption from present possession, and therefore more likely to mislead persons wishing to deal with the vendee with respect to the property. The change of possession is more likely to be known to third parties than the mere change of title. Nor is the contract now in question like one in which a stock of goods is sold to a merchant for retail, the seller retaining the title and giving possession to the purchaser. Retaining the goods is an indication of ownership

in addition to that of possessing. Nor is this contract like one by which property which is consumed in its use, for consumption, (as of provisions,) is sold on the condition that the title shall pass upon payment. Possession is indicated by acts incident to it, and consumption by those incident to it. The right of consumption and the right of possession each indicate ownership, and both are of more weight than either.

Courts have sustained contracts belonging to each of these three classes. They have held that the purchaser of the debtor, as well as the debtor himself, is bound when the latter, by agreement in good faith, puts the title to his property in his creditor as security; and that the possession in the case named, with the mere right to sell at retail, cannot, as against his vendee, pass the title in any other way; that the right to consume in the case named gives no authority to dispose of by sale; that the right of the purchaser of the vendee, the consumer in such case, is subject to the right of the person holding the title according to the first contract.

The courts of Illinois and some other states hold that conditional sales of the class involved in this case are invalid as against creditors and purchasers of the conditional vendee. The purpose of the rule is to prevent fraud. The argument against such sales is that possession of personal property is evidence of ownership, and to intrust persons with that evidence, without the title, gives them the means of defrauding and imposing upon others. This argument may also be made against loans, bailments, and leases of personal property. But it has been uniformly held that the purchaser of the borrower, the bailee, or lessee takes subject to the rights of the vendor or the bailor or the lessor.

In considering this contract we may refer to some general principles. Every person competent to contract is presumed to know that possession alone is not sufficient to confer title as against the owner, and if the purchaser relies upon it without inquiry, he does it at his peril. The law construes contracts according to the intention of the parties, and allows them to contract with whomsoever and upon whatever terms they may desire. A man should have a remedy according to his agreement, and should not be held to have trusted where he never intended to trust. The logic of these principles clearly sustains the rights of a conditional vendor against those of the purchaser of his vendee.

In an early case in Massachusetts, (*Coggill v. Hartford & N. H. R. Co.* 3 Gray, 545,) BIGELOW, J., said:

"The vendee in such cases, having no right to the property, can pass none to others. He has only a bare right of possession, and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary rule of carrying into effect the intention of the parties to a conditional sale and delivery. There is no good reason or equity in placing the burden of a fraudulent sale by a vendee, in violation of the condition on which he received the property, upon a *bona fide* vendor, rather than

upon a *bona fide* purchaser. On the contrary, if either is to lose by his fraudulent act, it should be the latter, who has dealt with a party having no authority, instead of the former, who relies upon a valid subsisting contract as the foundation of his claim. It is the duty of the purchaser to inquire and see that his vendor has a good title to the property which he undertakes to sell."

From the terms and conditions of the contract between the plaintiffs and Phelan & Ferguson, we are of the opinion that their intention was that the title to the engines, boilers, and saw-mills should not pass to the latter until the price agreed upon should be paid by them according to the notes given. And we hold that plaintiffs' title must prevail over the claim of the defendant. These conclusions, we think, are supported by reason and stand upon principle. They appear to be in harmony with the weight of authority. *Brown v. Haynes*, 52 Me. 578; *Rogers v. Whitehouse*, 71 Me. 222; *Kimball v. Jackman*, 42 N. H. 242; *Fisk v. Ewen*, 46 N. H. 173; *Armington v. Houston*, 38 Vt. 448; *Coggill v. Hartford & N. H. R. Co.* 3 Gray, 545; *Burbank v. Crooker*, 7 Gray, 158; *Goodell v. Fairbrother*, 12 R. I. 233; *Cragin v. Coe*, 29 Conn. 51; *Hine v. Roberts*, 48 Conn. 267; *Ballard v. Burgett*, 40 N. Y. 314; *Cole v. Mann*, 62 N. Y. 1; *Parmlee v. Catherwood*, 36 Mo. 479; *Ridgeway v. Kennedy*, 52 Mo. 24; *Hall v. Draper*, 20 Kan. 137; *Cole v. Berry*, 42 N. J. Law, 308; *Couse v. Tregent*, 11 Mich. 65; *Whitney v. McConnell*, 29 Mich. 14; *Knoulton v. Redenbaugh*, 40 Iowa, 114; *Sumner v. Woods*, 67 Ala. 139; *Hunter v. Warner*, 1 Wis. 141; *Pitts v. Owen*, 9 Wis. 152; *Kohler v. Hayes*, 41 Cal. 455; *Cardinal v. Edwards*, 5 Nev. 37; *Singer Manuf'g Co. v. Graham*, 8 Or. 17; *Call v. Seymour*, 40 Ohio St. 670; *Bradshaw v. Warner*, 54 Ind. 58; *McGirr v. Sell*, 60 Ind. 249; 1 Benj. Sales, (4th Amer. Ed.) §§ 309, 437, 439, 442, 443.

The judgment of the district court is affirmed.

EMERSON and TWISS, JJ., concurred.

SUPREME COURT OF NEVADA.

(19 Nev. 171)

THOMPSON v. RENO SAVINGS BANK and others.

Filed September 18, 1885.

1. CORPORATIONS—SUBSCRIPTION TO STOCK—SUIT BY CREDITOR TO ENFORCE PAYMENT OF.

Where subscriptions to the capital stock of a corporation are payable upon the call of the company, it is not necessary that a creditor of such corporation must, before instituting suit to compel the payment of such subscriptions, make an effort to compel the corporation to make the call.

2. SAME—STATUTE OF LIMITATIONS.

Where subscriptions to the capital stock of a corporation are payable upon call, and when no call is made, the obligation is a subsisting one, and the statute of limitations is not available as a defense unless set in motion by some adverse action.

Appeal from a judgment of the Seventh district court, Washoe county, entered in favor of plaintiff, and from an order denying defendant's motion for a new trial. For a full discussion of one branch of the case, see *Thompson v. Reno Savings Bank*, 7 Pac. Rep. 68.

Wm. Webster and *S. D. King*, for appellant.

John F. Alexander, for respondent.

BELKNAP, C. J. This is a suit in equity brought by respondent, a judgment creditor of the Reno Savings Bank, against appellant Huffaker, to recover the amount of his unpaid subscription to the capital stock of the bank. The suit is based upon facts corresponding in all essential respects with those in *Thompson v. Reno Savings Bank*, 7 Pac. Rep. 68, and the decision in that case, in so far as it is applicable, will be treated as decisive of this one, without further notice.

The first objection which we are asked to consider is that the complaint does not state a case entitling the plaintiff to sue. It is urged that subscriptions to the capital stock of the corporation are payable upon the call of the company, and that a creditor, to maintain a suit of this nature, must, before instituting it, make an effort to induce the corporation to make the call, and that no proper effort in this behalf has been made. In support of this view we are referred to a number of cases holding that a stockholder or creditor of a corporation may, under certain circumstances, and to prevent a failure of justice, institute and control a suit in his own name involving the rights of the corporation, if it has refused to take action. In this class of cases the right of action is primarily in the corporation, and it is entitled to the fruits of the litigation; but the stockholder or creditor is allowed to sue in order to protect the rights or property in which he has an interest. The principle involved in these cases has no application to cases of the nature of the one at bar, which is of the nature of a creditors' bill, brought by a plaintiff entitled in his own right to the relief which the judgment affords.

Another objection arises upon the order of the district court overruling the defense interposed of the statute of limitations. Appellant's subscription to the stock was made in the month of April, 1876, and it is said that a recovery thereon was barred within four years thereafter. The statutes relating to corporations provide that the by-laws may prescribe the times, manner, and amounts in which payments of subscriptions to the capital stock may be made. If the by-laws make no provision of this nature, and none was made by the by-laws of the bank, the trustees have power to require payment of such installments as they may deem proper. Comp. Laws, § 3398. The trustees of the bank, being subscribers to its capital stock, availed themselves of the privilege afforded by the statute, and made no call, except 30 per cent. of the amount subscribed at the commencement of business operations. No action has ever been taken by them to recover any portion of the remaining 70 per cent. of the subscribed capital. This unpaid amount was a part of the capital of the bank allowed to remain in reserve in the hands of the stockholders, but subject to call when needed. It was a continuing liability of the subscribers, which neither the indulgence of the trustees nor mere lapse of time could defeat. The statute of limitations is not available as a defense, because it has not been set in motion by any adverse action, such as a call by the corporation upon appellant to pay his subscription.

If the insolvency of the corporation set the statute in motion, sufficient time had not elapsed when this suit was commenced to bar a recovery. *Allibone v. Hager*, 46 Pa. St. 48; *Curry v. Woodward*, 53 Ala. 371; *Harmon v. Page*, 62 Cal. 448; *Thomp. Liab. Stockh.* §§ 290, 291.

The judgment and order of the district court are affirmed.

SUPREME COURT OF WASHINGTON TERRITORY.

(2 Wash. T. 381)

LEONARD v. TERRITORY.¹

Filed August 4, 1885.

1. **CRIMINAL LAW AND PROCEDURE—MURDER IN THE FIRST DEGREE—INDICTMENT—ESSENTIAL CHARGE.**
An indictment for murder in the first degree ought to charge the crime conformably to the definition of the statute.
2. **SAME—HOW TO BRING THE CASE UNDER THE STATUTE.**
To bring a case within the statute defining murder in the first degree, (Code, §§ 786, 790,) the indictment must charge that the killing itself was deliberate, premeditated, and malicious.
3. **SAME—INDICTMENT—INTENTION OF THE GRAND JURORS.**
The intention of the members of the grand jury in presenting a bill of indictment must be gathered from the indictment itself.
4. **SAME—SERVICE OF COPY OF INDICTMENT UPON DEFENDANT—FACT OF SERVICE NOT NECESSARY TO BE SHOWN IN RECORD.**
The statute provides for the service upon defendant, in a criminal prosecution, of a copy of the indictment 24 hours before his trial, but the record need not show the service.
5. **SAME—OATH OF JURORS—SUPPLEMENTARY WORDS.**
The oath taken by a jury, if it contain substantially the requisites of the statute, is not bad because of there being added after the words "true deliverance make * * * according to the evidence," the words "as given you on the trial."
6. **SAME—EVIDENCE—PAROL PROOF OF A WRITING.**
Parol evidence of the contents of a letter is not admissible without the proper foundation being first laid for such a mode of proof.
7. **SAME—MAP—INFORMATION OF HEARSAY CHARACTER.**
Discretion is vested in the court to admit a map in evidence under ordinary circumstances; but if the information which such map supplies has been gained by hearsay, it is not admissible.
8. **SAME—PROOF OF EXISTENCE OF ANOTHER PERSON CAPABLE AND IN A SITUATION TO COMMIT THE CRIME.**
In a prosecution for murder, when the evidence is circumstantial, testimony is admissible to prove that a person, other than the defendant, resided in the neighborhood of the supposed homicide, was there on the day of it, entertained hostile feelings towards the deceased, and had threatened to kill him.
9. **SAME—INSTRUCTION OF COURT—"CHAIN OF EVIDENCE."**
An instruction is bad that has a tendency to lead the jury to regard all the facts as disposed in a chain, every link in which, if such were the case, would need to be proved beyond a reasonable doubt.
10. **SAME—REASONABLE DOUBT—DEFINITION.**
A reasonable doubt for a trial juror is such a doubt as a man of ordinary prudence, sensibility, and decision, in determining an issue of like concern to himself as that before the jury to the defendant, would allow to have any influence whatever upon him, or make him pause or hesitate in arriving at his determination.
11. **SAME—EVIDENCE—INFERENCE FROM FAILURE TO REBUT FACTS PROVED.**
The spirit of the statute (Code 1881, § 1067) demands that the failure of the defendant to testify as to any point shall not operate to his disadvantage in any branch or aspect of the case.

Error to Second district.

¹See note at end of case.

W. Scott Beebe, for plaintiff in error.

N. S. Porter, for defendant in error.

GREENE, C. J. The plaintiff in error prosecutes this suit to reverse a judgment of death against him, and to procure a new trial. He was indicted in November, 1882, as is supposed, for murder in the first degree, and was convicted and sentenced in May, 1884. Errors in great number and variety are assumed to have occurred in the lower court, some before, some during, and some subsequent to the trial, any of which, it is claimed, would be sufficient to vitiate the judgment, and all of which, except what otherwise appear of record, are duly saved in a bill of exceptions. We will pass upon the most important of these supposed errors in their order.

A fatal defect, first of all, is alleged to exist in the indictment itself. Guilt of murder in the first or second degree cannot, it is contended, be gathered from the facts set forth as constituting the crime. "Every person," says our statute, "who shall purposely, and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be administered, kill another, every such person shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death;" and "every person who shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree." Code, §§ 786, 790. Such is the statute of murder under which the plaintiff in error was put to his trial upon an indictment, the body whereof reads as follows:

"Andrew Leonard is accused by the grand jury of the territory of Washington, composed of good and lawful men from the body of the Second judicial district, and from the counties of Cowlitz and Wahkiakum, duly elected, impaneled, sworn, and charged to inquire of and true presentment make to the said district court, at the regular November term, A. D. 1882, of the said district court, begun and held at Kalama, in the county of Cowlitz, in the district aforesaid, on the fourth Monday, being the twenty-seventh day, of November, A. D. 1882, of all offenses committed in the said district against the laws of the territory of Washington, by this indictment of the crime of murder in the first degree, committed as follows, to-wit: The said Andrew Leonard, on the fifth day of November, A. D. 1882, and within one year next preceding the date hereof, in the county of Cowlitz aforesaid, in the said district, in said territory of Washington, in and upon one Ambrose Patton feloniously, purposely, and of deliberate and premeditated malice, did make an assault; and that the said Andrew Leonard, with a certain gun, then and there loaded and charged with gunpowder and leaden bullets, then and there feloniously, purposely, and of deliberate and premeditated malice, did discharge and shoot off to, against, and upon the said Ambrose Patton; and that the said Andrew Leonard, with the leaden bullets aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Andrew Leonard discharged and shot off as aforesaid, the said Ambrose Patton in and upon the left side of him, the said Ambrose Patton, then and there feloniously, purposely, and of deliberate and premeditated malice, did strike, penetrate, and wound, giving to the said Ambrose Patton then and there, with the leaden bullets aforesaid, so as aforesaid shot and discharged and sent forth out of

the gun aforesaid, by the said Andrew Leonard, in and upon the left side and head of him, the said Ambrose Patton, eleven mortal wounds, of which said mortal wounds the said Ambrose Patton then and there instantly died.

"And so the jurors aforesaid do say that the said Andrew Leonard the said Ambrose Patton, in manner and form aforesaid, then and there feloniously, purposely, and of deliberate and premeditated malice, by means of said gun and the shooting aforesaid, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the territory of Washington.

"Dated at Kalama, in the district aforesaid, this twenty-ninth day of November, A. D. 1882."

Our statute requires that, to constitute such a murder in the first degree as would consist with the facts charged in this indictment, the killing must have been done purposely, and of deliberate and premeditated malice. Five or six states have statutes similar to, and three or four others statutes almost or quite identical with, our own. So far as we are advised, the supreme courts of all those states concur in holding that to bring a case within the statute the indictment must charge that the killing itself was purposed, deliberate, premeditated, and malicious. *Crim. Code. Or. § 506; State v. Brown*, 7 Or. 198; *Fouts v. State*, 8 Ohio St. 109; *Kain v. State*, Id. 307; *Hagan v. State*, 10 Ohio St. 459; *Bechtelheimer v. State*, 54 Ind. 135; *Snyder v. State*, 59 Ind. 105; *Code Iowa, § 4192; Fouts v. State*, 4 G. Greene, 500; *State v. McCormick*, 27 Iowa, 402; *Johnson v. Com.* 24 Pa. St. 386; *Meyers v. Com.* 83 Pa. St. 131; *Bower v. State*, 5 Mo. 379; *State v. Jones*, 20 Mo. 58; *State v. Feaster*, 25 Mo. 326; *State v. Wieners*, 66 Mo. 24; *Mitchell v. State*, 8 Yerg. 534; *Belknap v. Boston & M. R. Co.* 49 N. H. 369.

It is clear that the indictment ought to charge the crime conformably to the definition of the statute. Nowhere does the one before us so charge murder in either degree, unless its closing paragraph, beginning "and so," can be taken to eke out what is alleged in the preceding sentence. In the former part or body of the indictment, both purpose and malice are ascribed to the assault, and to the shooting and wounding, but neither of them to the killing, or giving of the mortal wounds. Since this is so, we conclude that if purpose or malice in the very killing itself is anywhere averred, it must be in the closing paragraph. Does that paragraph aver either? Evidently it does, if the positive allegation contained therein, "that the said Andrew Leonard the said Ambrose Patton, in manner and form aforesaid, then and there feloniously, purposely, and of deliberate and premeditated malice, by means of said gun and the shooting aforesaid, did kill and murder," introduced, as the allegation is, by the words "and so," can be held to be such an averment; and otherwise it manifestly does not. A meaning other than that which the grand jury may fairly be said to have intended it should bear cannot be given it. The incriminating facts upon which they intended the defendant should be tried they have undertaken to express in words. How

they say what they do say is the best and only possible evidence of what they intended to say. By the words they have used, and the structure they have given to the sentences into which they have framed their words, we shall ascertain the meaning they have intended.

Under our laws an indictment must be direct and certain, both as regards the crime charged and as regards the particular circumstances thereof, when they are necessary to constitute a complete crime. The circumstances of purpose and malice, as ingredients of the killing, are necessary to constitute the complete crime of murder, in either degree, by our law. Therefore, if the words "and so," preceding the averment of purposeful and malicious killing, indicate an intent on the part of the grand jury to announce a mere inference that they draw from facts they have previously set forth, then the charge that the defendant "purposely, and of deliberate and premeditated malice," killed, positive though it be, should not have the force of a direct and certain averment. How can it be sensibly claimed that an inferential statement should have the force of an absolute? Everybody recognizes and allows for the difference. Give to the one statement the same effect as to the other, and you break down and do away with those necessary partitions, those ancient landmarks, between meaning and meaning which must reverently be preserved and heeded, if communication between mind and mind is to be either possible or safe. It is true that our statute prescribing criminal procedure quite abolishes the embarrassing and injurious technicalities of the common law; but it also declares, in the interest both of the public and of the party accused, that the act or omission charged as crime shall be "clearly and distinctly set forth, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

From the statutory provisions we gather that our courts, and defendants in the courts, are to view indictments through the simple atmosphere of common sense, and not through the line-multiplying spectroscopy of the common law; but we do not understand that, in construing indictments, forms of expression are to be utterly disregarded, and that things are to be understood as intended to be expressed, for which there appears no adequate or sensible form of expression. That a defendant must be tried for something definitely charged, or he has no fair trial, is very clear. Our statute designs and insures a fair trial, and is in perfect harmony and furtherance of all constitutional provisions in that regard. From an application of these considerations to the form of expression adopted by the grand jury as the closing paragraph of their indictment in this case, it follows that if the language of the paragraph is such as would naturally be understood to state an inference, then neither the defendant nor the court, nor any person of common understanding, could have learned from the indictment that the grand jury found anything more than

the fact of manslaughter, and a conclusion of murder; for, assuming the paragraph to be purely inferential, they say, in effect, "We find it to be true, as matter of fact, that the defendant committed manslaughter, and we find it to be sound, as a conclusion therefrom, that he committed murder in the first degree." Grant such to be the meaning of this indictment, then the utmost issues upon which the defendant could be tried or his cause heard under it would be: (1) Is it true, as matter of fact, that he committed manslaughter? and (2) is it sound, as a conclusion therefrom, that he committed murder? Of course, the former is an issue of fact; the latter, one of law; and if these issues comprise all that arise under the indictment before us, the defendant could not be put upon his trial before a jury for any higher grade of offense than manslaughter.

Dictionaries furnish us with no definition of the word "so" that will fit the connection of this paragraph, except the word "therefore," or other words expressive of the idea of logical sequence. In a common-law indictment for murder a closing paragraph like this was regularly added after the charging part of the bill as "a conclusion of law." 1 Chit. Crim. Law, 231; 3 Chit. Crim. Law, 737; *Rex v. Nicholas*, 32 E. C. L. 747; 1 Russ. Cr. 563. Such a legal conclusion the grand jury who produced this indictment certainly could have expressed if they had so desired; and if, having so expressed themselves, we refuse to recognize their intention, we virtually take from them the power of expression. Easily they could have passed into the well-worn track of centuries of grand juries who had gone before them. Then, if they appear to have done this, why should we not understand that they have done it? Every "person of common understanding" must, upon reflection, it seems to us, perceive that they have.

Reaching this conclusion we find ourselves well supported by authority. No abler judges have graced the supreme bench of Iowa than Judges GREENE and DILLON. A decision is reported of each of them on the precise point of the insufficiency of an indictment like this to sustain a conviction of murder. *Fouts v. State*, 4 G. Greene, 500; *State v. McCormick*, 27 Iowa, 402. Likewise has decided the supreme court of Ohio in two well-considered opinions. *Fouts v. State*, 8 Ohio St. 109; *Kain v. State*, Id. 307.

Leaving now the indictment, we pass to another supposed error. It appears that the record fails to show that the defendant was served with a copy of the indictment 24 hours before trial. For such service provision is made by statute, but we do not think that the record need show the service. *Lytle v. Territory*, 1 Wash. T. 435. Exception could have been taken by defendant to the action of the court below if it forced him to trial contrary to the statute. There is no claim that he did not seasonably get his copy of the indictment, but only that the record does not show he did. Hardships, if there were any, would have been relieved upon exception.

Referring to the next supposed error, we find it relates to the oath

administered to the trial jury. Objection is made that the oath administered was fatally variant from that prescribed by statute. Under the statute, a jury in a capital case must be sworn to "well and truly try and true deliverance make between the territory and the prisoner at the bar whom they shall have in charge according to the evidence." Code 1881, § 1084. Going into this case the jury were sworn to "well and truly try and true deliverance make between the territory and the prisoner at bar, whom they shall have in charge, according to the law and the evidence as given them on the trial." How this oath can be held bad we do not see, unless the words "as given them on the trial" are to be regarded as qualifying the word "evidence" only. Judged by the ordinary rules of speech it should be understood to qualify the whole phrase, "the law and the evidence." Evidently, it would be error to give the jury to understand, under the solemn form of an oath, that on them rested the responsibility of having the defendant tried according to law. Such, however, was not the sense of the oath they took. Under it, they were bound to no other obligation than would have been theirs under the simpler statutory formula. Substantially their oath corresponded to that which this court upheld in the case of *Hartigan v. Territory*, 1 Wash. T. 447, and which followed the statute, save that it added the supplementary words, "and the law as given by the court." Cases cited by counsel, none of them conflict with that decision.

Holding, as we do, respecting the indictment, the divergence of the oath under consideration from that prescribed for capital cases becomes immaterial, except as the latter, because prescribed for such cases, naturally and practically becomes the oath under which are tried all sorts of cases of included crimes. Regarding this indictment, however, as one for manslaughter simply, for the trial of which crime, when not included in a charge of murder in the first degree, the statute prescribes that the jury shall be sworn to "well and truly try the issue between the territory and the defendant according to the evidence," (Code, § 1084,) we think the oath actually administered nevertheless good. It contains nothing but what the legislature have approved as a fitting oath for the trial of manslaughter when included in the capital charge, together with the addition already discussed. Still, we think, correct practice requires close adherence to the statutory formulas in the administration of trial oaths, and we would not be understood to countenance any looseness in that respect. The legislature presumably had some sound reason in prescribing one form of oath for capital and another for all other cases.

On the trial, a witness, George Roberts, was permitted to state the contents of a letter signed "J. Jackson," and the permission has been assigned as error. Under the circumstances we are of opinion that it was error. Really, so far as the transcript shows, no sufficient foundation had been laid for proof by parol. Letting that be as it may, there was, apart from the contents of the letter, no evidence to

connect it with the defendant, and there was nothing in the contents themselves, in the light of the other evidence, that would point to defendant as the writer.

Offer was made by defendant, in course of the trial, to introduce in evidence a map marked "Exhibit A," and intended to exhibit and illustrate the vicinity of the supposed homicide. Refusal by the court to admit the map is one of the errors assigned. Discretion was vested in the court, we think, to admit or reject a map, under the circumstances in evidence. But this particular map was loaded with explanatory matter in the nature of hearsay, and should properly have been excluded under any circumstances. We find no error in the refusal complained of.

In excluding certain proffered testimony of James Galloway, a witness for defense, it is claimed there was error. By him defendant proposed to prove that a person other than himself resided in the neighborhood of the supposed homicide, was there on the day of it, entertained hostile feelings towards the deceased, and had threatened to kill him. In view of the evidence for the prosecution, we think this testimony should have been admitted. One main question on the trial was, who killed the deceased? Addressed to this, the evidence for the prosecution was wholly circumstantial, and some of it, tending to identify the defendant as the slayer, was of a like description to that proposed to be obtained from this witness. Defendant, therefore, had a right to meet and neutralize or overcome the evidence of the prosecution, tending to identify himself as the guilty party, by evidence of the same nature tending to identify some other person as the perpetrator of the crime. *Dubose v. State*, 10 Tex. App. 246; *State v. Johnson*, 30 La. Ann. pt. 2, 921; *State v. Johnson*, 31 La. Ann. 368; *Dean v. Com.* 32 Grat. 912; *State v. Curtis*, 70 Mo. 594; *State v. Edwards*, 71 Mo. 312; *State v. Trivas*, 36 Amer. Rep. 293.

Among the instructions given for the prosecution was this:

"The rule requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of *each link* in the chain of circumstances *relied upon* to establish the defendant's guilt. It is sufficient, if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt that the defendant is guilty."

The giving of this instruction, we think, is well assigned as error. The metaphor of the "chain," taken in connection with the remainder of the instruction and the evidence, seems to us inaccurate and misleading. Probably what the judge meant to say was that the jury did not need to be satisfied beyond reasonable doubt of every inculpatory fact. Ordinarily, in a case resting in circumstances, a linked arrangement of fact to fact is observable in a part or parts of the evidence. But a guilty person is more commonly hemmed in by a throng of circumstances than inclosed by facts arranged chain-wise. Release from a chain comes when the weakest link gives away; but

escape from a crowd does not necessarily depend on the presence or absence of one or another, or even, perhaps, the greatest number, of the individuals composing it. In this case the inculpatory facts were grouped about the prisoner, and only a part of them were linked together, or strictly interdependent. The fault in the instruction lies in its tendency to lead the jury to regard all the facts as disposed in a chain, every link in which, if such were the case, would need to be proved beyond a reasonable doubt.

Two other instructions for the prosecution, the giving of each of which is assigned as error, are as follows:

(1) "The jury are instructed that the reasonable doubt which entitles an accused to acquittal is a doubt of guilt arising from all the evidence in the case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act without hesitation in their most important affairs. By a reasonable doubt is meant an actual, substantial doubt; not a doubt from mere caprice or groundless conjecture."

(2) "That while it is necessary for the prosecution to prove every material allegation in the indictment beyond a reasonable doubt, yet if the proof is of the nature that it would control and decide the conduct of reasonable and cautious men in the highest and most important affairs of life, then, as a matter of law, facts established by such evidence are deemed to be established beyond a reasonable doubt, and the jury, with that kind and degree of proof before them as to every material allegation, should convict."

Both of these instructions seem to us erroneous. The former is good, if tested by the definition of reasonable doubt given by most of the law writers and courts. Still, it seems to us open to criticism. The latter does not discriminate between considerations which would ultimately decide and control the conduct of reasonable and cautious men, and suggestions which would receive a certain amount of attention and deliberation, though eventually to be rejected. Pertinently to both instructions, we would remark that the most important affairs of ordinarily prudent men, or affairs that are deemed such, are often mere matters of business or pleasure, or some small risk to life or limb. Whether a doubt is reasonable or not is never an absolute, but always a relative, question. It can only be answered by reference to the circumstances and the issues to which it is related. What would not be a reasonable doubt in a matter of slight consequence and in one situation would be a reasonable one in another posture of affairs, and in a matter more momentous. A sensible and humane man will proceed more cautiously when life or death turns on which step he takes, than if the result involved is the payment of some small fine. "Skin for skin; all that a man hath will he give for his life." A doubt is reasonable if, in view of all the surroundings and the issue to be decided, it would not be unreasonable to entertain it; which is much the same as to say that a reasonable doubt is one that is reasonable. A reasonable doubt for a trial juror is such a doubt as a man of ordinary prudence, sensibility, and decision, in determining an issue of like concern to himself as that be-

fore the jury to the defendant, would allow to have any influence whatever upon him, or make him pause or hesitate in arriving at his determination.

In the last instruction for the prosecution, the court tells the jury:

"That the fact that defendant does not disprove circumstances proved before them will give additional weight to such circumstances as are proved, if the jury believe the defendant has the means of disproving them if they be false."

This also is objected to as erroneous, and we deem the objection sound. It is assumed, by this language, that circumstances have been proved, whereas it is for the jury to say whether any have been proved or not. Moreover, by it the jury are charged that the defendant's failure to disprove will give additional weight to circumstances proved; whereas, in truth, the failure does not necessarily add weight to anything, but only brings into the case an additional circumstance of greater or less significance, namely, the failure itself, which circumstance is to be received by the jury for whatever, on the whole, it is worth, and may or may not combine with the other circumstances in the case, adding its weight to theirs, so that they, with it, will weigh more than they would alone. As to any failure on the part of defendant himself to testify, we doubt whether the instruction is sufficiently qualified to the apprehension of the jury by another correct instruction afterwards given, to the effect that the jury should draw no inference of guilt against the defendant from his failure to testify in his own behalf. The Code provides:

"That it shall be the duty of the court to instruct the jury that no inference of guilt *shall arise* against the accused, if the accused shall *fail* or *refuse* to testify as a witness in his or her own behalf." Code 1881, § 1067.

We think that the spirit of this provision demands that the failure of the defendants to testify as to any point shall not operate to his disadvantage in any branch or aspect of the case.

The next and last supposed error that deserves particular notice is the giving of the following instruction:

"If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you may find him guilty of such a degree of crime as the facts so found show him to have committed; but if you do not find such facts so proven, then you must acquit. The facts which you must find to be established to the degree above stated are that Ambrose Patton, named in the indictment, is dead; that he came to his death by reason of a gunshot wound or wounds; and that said wound or wounds were purposely inflicted by the defendant. These facts being so proven, the defendant should be convicted of manslaughter; and if you find, in addition to these facts, the further fact that the said wound or wounds were so inflicted with an intent to kill the deceased, then you may convict defendant of murder in the second degree; and if you further find the additional fact that such intention to kill was deliberated upon and premeditated by the defendant, then you may find him guilty of murder in the first degree, as charged in the indictment. In determining the question of intention, you have a right to assume that the defendant intended the usual and probable effect of the acts which you find that he has committed."

It is very observable that this instruction does not leave the jury at liberty to find that the homicide, if committed, was justifiable or excusable; nor does it make malice necessary to murder in either degree; nor does it inform the jury that, in order to constitute murder in the first degree, the malice, and not merely the killing, must be deliberate and premeditated; nor does it take account of the infirmity of the indictment, which falls short of charging more than manslaughter. In these respects the instruction did not correspond with the law.

Many other supposed errors are assigned, but all of them that we consider well assigned, and of importance, can be disposed of by application of the same principles already enunciated. Nothing, therefore, remains for us to say, bearing upon the decision of this cause. But, in view of the verbiage characterizing the form of indictment before us, we think it not out of place for us, in closing this opinion, to recommend, as more conformable to our statute, a form suitable, *mutatis mutandis*, for use by the grand juries and prosecuting officers of this territory, as follows:

"District Court for the Second Judicial District of Washington Territory, holding terms at Kalama.

"The Territory of Washington v. Andrew J. Leonard.

"Andrew J. Leonard is accused by the grand jury of the territory of Washington for the counties of Cowlitz and Wahkiakum, by this indictment, of the crime of murder in the first degree, committed as follows: He, said Andrew J. Leonard, in said county of Cowlitz, on the fifth day of November, 1882, purposely, and of his deliberate and premeditated malice, killed Ambrose Patton, by then and there purposely, and of his deliberate and premeditated malice, shooting and mortally wounding the said Ambrose Patton, with a gun, which he, the said Andrew J. Leonard, then and there held in his hands.

"Dated at Kalama, in the district aforesaid, the twenty-ninth day of November, 1882.

N. H. BLOOMFIELD, Prosecuting Attorney."

The judgment of the district court will be reversed, and a new trial granted.

WINGARD, J. I concur in all the foregoing opinion, except the reasoning and conclusion in regard to the sufficiency of the indictment. See dissenting opinions of Justices SWAN and BRINKERHOFF in *Fouts v. State*, 8 Ohio St. 109.

TURNER, J. In concurring in this opinion I desire to dissent from the reasoning of the court as to the thirteenth instruction. I agree that that instruction is error; but I think it is error because it directs the jury to consider the failure of the accused to offer evidence in his defense for the purpose of assisting them to remove a reasonable doubt of his guilt, when, under the law, he is in no case required to offer evidence until his guilt is established beyond a reasonable doubt. In other words, I do not think the failure of an accused person to offer

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evidence can, in any case, be considered by the jury as a circumstance to determine, or to assist in determining, his guilt.

NOTE.

The guilt of the accused must be established beyond a reasonable doubt. *Cornish v. Territory*, 3 Pac. Rep. 793. In this case the court say beyond a *possible* doubt. A reasonable doubt does not mean all doubt, (*U. S. v. Wright*, 16 Fed. Rep. 112;) it must be a substantial, and not an imaginary or speculative doubt, (*U. S. v. Keller*, 19 Fed. Rep. 633;) such a doubt as a prudent and reasonable man would be likely to act upon in determining important affairs of life, (*People v. Dewey*, 6 Pac. Rep. 103;) such a doubt as fairly and naturally arises in the mind of the jury after fully and carefully weighing and considering the evidence which has been introduced, viewed in all the light and circumstances surrounding the case. *State v. Stewart*, 3 N. W. Rep. 99. It must arise from a candid and impartial consideration of all the evidence in the case. *State v. Pierce*, 21 N. W. Rep. 195.

A preponderance of evidence is not essential to raise a reasonable doubt of defendant's guilt, (*State v. Red*, 4 N. W. Rep. 831; *State v. Porter*, 20 N. W. Rep. 168;) nor weight of preponderant evidence. *Walbridge v. State*, 13 N. W. Rep. 209. "Clearly proven" has been held not to be "beyond a reasonable doubt." *State v. Stewart*, 3 N. W. Rep. 99. The jury must be satisfied beyond a reasonable doubt as to each link in the chain of evidence. *Marion v. State*, 20 N. W. Rep. 289. The *corpus delicti* must be proven. *Territory v. Monroe*, 6 Pac. Rep. 478. It has been held that an instruction directing the jury to determine this question of fact of proof beyond a reasonable doubt "just as they would determine any fact in their own private affairs," is not sufficient. *Territory v. Lopez*, 2 Pac. Rep. 364.

Each juror is to act upon his own judgment, and if he entertains a reasonable doubt is not required to surrender his convictions and render a verdict merely because the other jurors entertain no such doubt. *State v. Hamilton*, 11 N. W. Rep. 5. Proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinarily prudent men with a conviction on which they would act in the most important concerns or affairs of life. *Polin v. State*, 16 N. W. Rep. 898.

Where a criminal charge is sought to be proved by circumstantial evidence, the proof must not only be direct, (*State v. Clemons*, 1 N. W. Rep. 546,) but also consistent with the guilt of the accused, and inconsistent with any other rational conclusion. *Walbridge v. State*, 13 N. W. Rep. 209; *People v. Davis*, 1 Pac. Rep. 889. It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every hypothesis except the single one of guilt. *People v. Davis*, 1 Pac. Rep. 889. That testimony not believed does not raise. *Binfield v. State*, 19 N. W. Rep. 607. What amounts to, in defense of *alibi*. *State v. Reed*, 17 N. W. Rep. 150. It has been held that if there is evidence upon which a verdict of guilt might reasonably be founded, an appellate court will not interfere, whatever may be their opinion as to the weight or preponderance of the evidence. *Cornish v. Territory*, 3 Pac. Rep. 793.

(2 Wash. T. 472)

PUGET SOUND IRON CO. v. WORTHINGTON and others.

Filed July 20, 1885

1. PRACTICE—ORDER OF ENTRIES BY CLERK—EFFECT.

The order in which the proceedings of the court upon the same day are entered in the journal does not necessarily determine the order in which those proceedings occurred.

2. SAME—APPEAL—STATEMENT OF FACTS—ACT OF 1883.

The statement of facts provided to be settled by section 3 of the act of 1883 may include everything material that transpired in the cause, not otherwise a part of the record.

3. SAME—NOTICE OF APPEAL—HOW EFFECTED.

The act of 1883 does not require more than notice by the appellant to the appellee, within 30 days after the rendition of the order or judgment desired to be reviewed, to appear before the judge upon a day named, which day shall not be more than 10 days after the service of such notice, and agree upon the facts.

4. SAME—INSTRUCTIONS—NOT PART OF RECORD.

The instructions of the trial court are no part of the record, and should not be included in the transcript.

5. SAME—BRIEF—FAILURE TO NOTICE DEFECT IN RECORD.

Counsel, having failed to remark in their brief upon a defect in the record, are not precluded from asking upon appeal to have the improper matter objected to stricken out.

6. SAME—STATEMENT OF FACTS—INFORMALITIES—EFFECT.

A statement of facts made as a separate paper from the balance of the transcript, bearing no file-mark of the clerk of the lower court, and bearing no evidence that it was transmitted to the supreme court with the transcript, cannot, in such a shape, be considered by the supreme court.

7. SAME—OBJECTION UPON ARGUMENT—INDULGENCE OF COURT.

If objection to a statement of facts for certain informalities of the clerk below, which can be easily rectified, is first made in argument upon appeal, the court will allow the necessary correction to be made.

Jacobs & Jenner, J. R. Lewis, and Bradshaw & Sachs, for appellant,
Puget Sound Iron Co.

Burke & Haller, for appellees, Worthington Bros.

TURNER, J. The appellees moved to dismiss this appeal, which was taken under the appeal act of 1883, because (1) no notice of appeal from the final judgment in this cause, or from any judgment therein, was ever given or served. (2) No notice of assignment of error has been made or served.

1. The record shows that notice of appeal was given by the appellant in open court, and entered upon the journal of the court, as required by the act of 1883. This notice was given on the same day that the judgment was pronounced, but its entry upon the journal precedes the entry of judgment. It is assumed by the appellees, from this fact, that the notice was given before the judgment was pronounced, and it is argued correctly from this assumption that the notice had no efficacy as a step in removing the cause to this court.

We do not think that the order in which the proceedings of the court upon the same day are entered in the journal necessarily determines the order in which those proceedings occurred. These entries are but the history of past transactions, and, in the absence of some indication to the contrary, it is proper to look to the sense of the different steps of the court which are the subject of the entries, to determine their sequence, rather than to the order in which the clerk, performing a purely ministerial duty, makes note of those steps. The judgment and the notice of appeal having been entered in the journal upon the same day, and the latter naturally following the former in the correct and orderly prosecution of the suit, it will be presumed that the notice of appeal was not given until after judgment.

2. We find a proper assignment of errors, with a proper return of service upon the appellees, in the record. The clerk of the lower court, in his certificate to the transcript, unnecessarily descended to particulars, and undertook to describe in his certificate each and every paper included in the transcript, and he omitted to include in that

description the assignment of errors. The objection of the appellees should have been to the certificate to the transcript.

There is an assignment of errors in the record. The form in which the objection is made is faulty, as being inaccurate, and as failing to inform the plaintiffs in error with certainty of the particular defect moved against. The motion to dismiss is denied.

The appellees move to strike from the statement of facts in the cause all statements of exception to the rulings of the court allowed therein, because said exceptions were not saved in a regular bill of exceptions, as provided by the Code, c. 19. The statement of facts provided to be settled by section 3 of the act of 1883 may include everything material that transpired in the cause, not otherwise a part of the record. This was obviously the intention of the legislature. If a party wishing to appeal were required to preserve his exceptions by a regular bill of exceptions, the procedure by appeal under the act of 1883 would be more cumbersome than it was before the passage of that act. He would be required to present the judge with a bill of exceptions and statement of facts, where before he could have combined both his exceptions and his facts in his bill of exceptions. Considering the spirit of the act of 1883, the language should be imperative to justify such a construction. The exceptions were properly preserved in the statement of facts. We do not mean to indicate an opinion that both the exceptions and the evidence may not be preserved by bill of exceptions, and be brought to this court with the balance of the record by appeal, under the act of 1883. The appellees move to strike the statement of facts from the record, for the reason that the notice for the settlement of the statement of facts served upon them was not accompanied by a copy of the proposed statement, and did not in any way indicate its contents to them, or in any other manner give them means to acquaint themselves with its contents. The act of 1883 does not require anything more in this connection than notice by the appellant to the appellee, within 30 days after the rendition of the order or judgment desired to be reviewed, to appear before the judge upon a day named, which day shall not be less than 10 days after the day of service of the notice, to settle and agree upon the facts. This is the plain requirement of the law,—no more, no less. To import into it by the decision of the court the requirement that a copy of the proposed statement of facts shall accompany the notice, or that the original of the proposed statement shall be lodged somewhere for the inspection of the appellee, would be to assume to ourselves legislative functions. Counsel for appellees did not indicate clearly whether in their opinion they should have had a copy of the proposed statement, or whether the notice should have informed them that the statement had been lodged with some other officer for their inspection. Considering the size of some of the statements of fact produced at the present term, to require a copy to be served in all cases would be an intolerable burden which

we are indisposed to hold that the legislature intended to impose, in the absence of explicit directions to that effect. To hold that the original statement must be lodged with some one would require us to evolve from our inner consciousness the particular individual or official upon whom this trust should be devolved. We cannot do it. No doubt it would add efficacy to the act of 1883 to require the proposed statement of facts to be lodged with the clerk of the lower court for the inspection of the appellee at the same time that the notice to settle the facts is given, and probably the court has power by rule to require this to be done for the future. But this notice is to be measured by the act of 1883 alone, and, measured by that, we deem it sufficient. The motion to strike from the transcript what purports to be the instructions given and refused by the judge is granted. These instructions are not included in the statement of facts signed by the judge, nor are they preserved by bill of exceptions. They are certified by the clerk as a part of the record. Manifestly they are no part of the record, and they have no business in the transcript.

The appellees move to strike from the transcript the purported statement of facts, upon the further ground, not indicated in their brief, that it is a separate paper from the transcript, and is not certified or identified in any way other than by its title as the statement of facts in this cause. The objection is made by appellant that counsel should have noticed this defect in their brief, and, having failed to do so, are now precluded from moving against it; but upon the authority of *Mulkey v. McGraw*, 5 Pac. Rep. 842, decided at the last term of this court, we hold the contrary.

Recurring now to the last objection to the statement of facts, we find that that document is a separate paper from the balance of the transcript; that it bears no file-mark of the clerk of the lower court, and is accompanied with no evidence that it was transmitted to this court with the transcript, by the clerk of the lower court, as the statement of facts in this cause. The paper may be a statement of facts in some other cause. After having been settled it may have been withdrawn by the parties. If it had been deposited with the clerk of the lower court, and that fact properly evidenced, we might presume from the identity of the parties that it belonged to this cause, and might presume further, from the fact of its being here, that it had come here properly. In its present shape we cannot consider it at all. Inasmuch as this objection was taken for the first time at the argument, we think the appellant should have an opportunity to cure the defect, and will order that the paper purporting to be the statement of facts be stricken from the transcript, unless appellant cause it to be properly certified by the clerk of the lower court on or before July 27th, inst. And for this purpose appellant may have leave to withdraw the same from the files of this court. The appellant should have asked for this relief by cross-motion, and it is now granted by the court, *ex mero motu*, because of the informal manner in which the

question was raised, and for the purpose of indicating the correct practice in such matters hereafter.

WINGARD, J., concurs.

(2 Wash. T. 472)

PUGET SOUND IRON CO. v. WORTHINGTON and others.

Filed August 4, 1885.

1. PRACTICE—RESTATEMENT OF CAUSE OF ACTION—AMENDMENT—NEW ASSIGNMENT.

If, under the system of practice in Washington Territory, it becomes necessary for a party to restate his cause of action, he may do so by amendment. There is no new assignment known under that system.

2. SAME—IMPROPER ADMISSION OF FACTS IN EVIDENCE—ERROR, HOW CURED.

Error in admitting facts in evidence is cured by the subsequent withdrawal of them from the consideration of the jury.

3. SAME—ANSWER—DENIAL—NEW MATTER.

A defendant, after denying all the material allegations of the complaint, adds nothing to that denial by setting out affirmatively a version of the contract sued upon which he insists is the true one.

4. CONTRACT—STATUTE OF FRAUDS.

Examination of a contract as to its character as one of sale or otherwise, and as to the application of the statute of frauds.

J. R. Lewis and O. Jacobs, for appellant, Puget Sound Iron Co.
Burke & Haller, for appellees, Worthington Bros.

TURNER, J. The action in the court below was brought by the appellees against the appellant for the breach of a contract described as follows:

"Said defendant entered into a contract with plaintiffs, by the terms of which it was, among other things, mutually agreed to the effect that said defendant should cut, cord, and furnish to plaintiffs, within a reasonable time thereafter, all the cord-wood on the lands known as the 'Bishop and Johnson land,' situate at Irondale, Jefferson county, aforesaid, for the purpose of the whole thereof being made and converted into good and merchantable charcoal by plaintiffs; and said defendant further agreed to pay plaintiffs eight cents for each and every bushel of said charcoal delivered by plaintiffs to defendant, and to charge plaintiffs for said wood at the rate of one dollar for every forty bushels of charcoal delivered as aforesaid, and no more."

The complaint alleges performance upon the part of plaintiffs with all the conditions of the contract, and alleges as a breach by the defendant the refusal to deliver the balance of the wood described in the contract, some 4,000 cords, to be made into charcoal by the plaintiffs.

Here defendant in its answer denies all the material allegations of the complaint. For an affirmative defense it sets out *in hæc verba* a written contract entered into between the plaintiffs and itself, on the day alleged in the complaint as the day on which the contract sued on was made, whereby it was to deliver to the plaintiffs, to be made up into charcoal, 10,000 cords of wood, more or less; alleges that no other contract than the contract thus set out was ever entered into between plaintiffs and itself, and alleges that it has fully performed

the conditions of said contract by delivering to the plaintiffs some 13,000 cords of wood.

The plaintiffs replied to the answer as follows:

"That at the time of the making of said written agreement, and thereafter, it was mutually agreed by and between plaintiffs and defendant, in addition to said writing, and as part of the contract sued on in this action, that defendant should furnish plaintiffs, within a reasonable time, and plaintiffs should manufacture into charcoal, and deliver at the price named in the said writing, all the cord-wood then cut and corded, or standing or lying or being, upon all the lands known as the 'Bishop and Johnson lands,' situated at Irondale, aforesaid."

The defendant demurred to this reply, which demurrer was overruled. The parties then went to trial, and the trial resulted in a verdict for plaintiffs. The cause is here by appeal under the act of 1883.

The first matter assigned by the appellant as error which we shall notice is the failure of the court to sustain the demurrer to the reply. The appellant attacks the reply as a departure in pleading. The appellees attempt to sustain it as a new assignment of the contract described in the complaint. In our judgment it is neither. It is not a departure, because it is perfectly consistent with the complaint. It is not a new assignment, because there is no such thing as a new assignment, as that term was understood at common law, under our system of pleading. If, under our system, it becomes necessary for a party to restate his cause of action, he may do so by amendment. The reply must traverse, or confess and avoid. Code, § 86.

But the reply was, for the purposes of the action, wholly impertinent. It should have been stricken from the cause. It was no more impertinent, however, than the affirmative defense which it professed to reply to. Under our system of pleading the technical learning of the common-law pleader is of but little account. The plaintiff is required to state his cause of action with sufficient particularity to apprise the defendant of its true character. The defendant in his answer must deny the facts alleged in the complaint, or he must state new matter in avoidance or by way of counter-claim. If these several pleadings are not accurate and full, the party required to take the next step may have them made more definite and certain before he proceeds. With these fundamental principles kept in view, it would seem easy for a person of ordinary intelligence to frame correct pleadings. In this case the defendant denied all the matters averred in the complaint. His affirmative defense cannot be construed as doing more; neither the supposed affirmative defense nor the reply to it added anything to the issue, which was fully and completely made up when the defendant denied that it made the contract described in the complaint. It added nothing to that denial to set out affirmatively the version of the contract which defendant insisted was the true one. Seeking no affirmative relief, it made no difference what other contract it had made with plaintiff, if it had not made

the one sued on. It is a matter of surprise to the court that counsel of so much ability and industry as those engaged in this cause should have overlooked these plain and obvious principles of code pleading. The court properly overruled the demurrer to the reply.

The record shows that the defendant, before demurring, moved to strike the reply, but upon what ground is not shown. No exception was reserved to the action of the court overruling that motion. In any event, we should not consider the error as sufficient to justify a reversal. The defendant was not prejudiced by the reply, except in the matter of additional costs, and it had set the example of making useless costs by filing an answer stuffed with impertinent averments.

The next matter assigned as error is the action of the court in permitting the plaintiffs to introduce in evidence negotiations, propositions, talks, and bargainings had between the parties prior to the making of the written contract.

Without deciding whether the facts received in evidence are accurately described in the assignment, or whether, such as they were, the court erred in receiving them, it is sufficient to say that the court, in its charge to the jury, withdrew all such facts from their consideration. This cured the error in receiving the facts, if there was any error.

The next and last assignment of error insisted on is that the court permitted the plaintiffs to show a verbal contract made after the making of the written contract, whereby the number of cords of wood to be delivered the plaintiffs, to be made into charcoal, was increased from the number fixed by the written contract to all the wood on the "Bishop and Johnson lands." It is insisted by the appellant that, the contract being for the sale of goods, wares, and merchandise of the value of \$50 or more, the same is required to be in writing, and that the terms cannot be altered or added to by parol. The contract in this case was for the delivery by the defendant to plaintiffs of a certain quantity of wood, which was to be manufactured into charcoal by plaintiffs, and then delivered to the defendant. In the settlement between the parties the defendant was to be allowed for the wood at the rate of one dollar per cord, and the plaintiffs were to be allowed for the charcoal at the rate of eight cents per bushel. The defendant agreed in the written contract to pass credits from plaintiffs "on their books for all labor performed in their coal contract, and when the contract is completed, to pay them, their hands, and coal-haulers the full amount due them." The defendant was to furnish all coal-beds; said beds to be returned to them on the completion of the contract. By a further provision, "all cooking utensils and supplies, and all tools and property of every description, used in the performance of this contract, received from this company, [the defendant,] and remaining unpaid for, shall not be subject to sale or other disposition by said parties of the second part," etc.

It seems plain, from this description of the contract, that it was

not a contract of sale, and hence that it was not within the statute of frauds. *Goddard v. Binney*, 115 Mass. 450; *Hight v. Ripley*, 19 Me. 137; *O'Neil v. New York, etc., Min. Co.* 3 Nev. 141; 3 Wait, Act. & Def. 514; 7 Wait, Act. & Def. 49. The contract not being one required to be in writing, it might be altered by parol, and the written contract and the verbal alterations stand as one contract. Bish. Cont. §§ 643, 645, 647; 7 Wait, Act. & Def. 377. The verbal contract proven in the court below conforms to the contract averred in the complaint, and there was no error in receiving the same.

The judgment of the court below is affirmed.

HOYT and WINGARD, JJ., concur.

(2 Wash. T. 355)

MEEKER v. GARDELLA and others.

Filed July 15, 1885.

APPEAL—ACT WASHINGTON TERRITORY 1883—CERTIFYING EVIDENCE.

Where notice of appeal has been regularly given and entered of record in the lower court, conformably to the appeal act of 1883, and afterwards proceedings are instituted with a view to taking and perfecting an appeal under the provisions of the Code, and the evidence is certified to the supreme court by the clerk of the lower court as written evidence, such evidence may on motion be stricken out, but the appeal will not be dismissed.

Appeal from Second district.

Arthur Meeker, for appellant, Ezra Meeker.

Judson & Burke, for appellees, A. Gardella and others.

GREENE, C. J. This is a motion to strike the evidence from the files of this court, and dismiss the appeal. From inspection of the transcript we find that notice of appeal was regularly given and entered of record in the lower court, conformably to the appeal act of 1883, and that afterwards proceedings were instituted with a view to taking and perfecting an appeal under the provisions of the Code. In course of these latter proceedings, and in regular form, this mass of evidence has been certified to this court by the clerk of the court below as written evidence. The evidence could not, in our opinion, be so certified. If it was to be brought up at all, it should have been removed here by compliance with the provisions of the act of 1883. After notice of appeal duly given and entered in the lower court, there remained in that court no cause that could be appealed under the Code. But the inadmissibility of this mass of evidence is no ground for dismissing the appeal, although the exclusion of it may render the appeal inefficacious.

Let the motion, so far forth as it calls for the striking out the evidence, be granted; but so far forth as it asks for dismissal of the appeal, be denied.

WINGARD and TURNER, JJ., concur.

(2 Wash. T. 366)

CARROLL v. ANDERSON.

Filed July 15, 1885.

APPEAL.—SUPREME COURT RULES 8 AND 9—BRIEFS—COSTS.

Motion to strike brief of defendant in error from files, because of a failure to set out in his citations the names of volumes and titles of cases without abbreviation, and to place the title of the cause and indorsements on the left-hand of the back cover of the brief, denied, but ordered that no costs for briefs be taxed in the cause in favor of defendant in error.

Motion to strike brief of defendant in error.

P. P. Carroll, in propria persona.

C. W. Hartman, for defendant in error.

BY THE COURT. We are disposed to sustain the points made by the plaintiff in error, so far as to hold that there has been a non-compliance on the part of defendant in error with rules 8 and 9, in failing to set out in his citations the names of volumes and titles of cases without abbreviation, and to place the title of the cause and indorsements on the left half of the back cover of the brief. But no showing by affidavit, as was necessary, has been made as a basis for the point that there is a culpable failure to specify the number of the edition of any text-book cited. We do not understand the rule to require that the Christian names of parties, nor the names of all parties, to cases cited should be set out.

It seems to us that to strike the faulty brief from the files would, in this instance, be too heavy a penalty to visit upon the offending party. It will be sufficient to impose, as terms for allowing the briefs to remain on file, the costs of the briefs. Accordingly, we shall order that no costs for briefs shall be taxed in this cause in favor of defendant in error.

WINGARD and TURNER, JJ., concur.

(2 Wash. T. 417)

WILT, Guardian, etc., v. BUCHTEL.

Filed August 4, 1885.

SPECIFIC PERFORMANCE—STATUTE OF LIMITATIONS.

Carroll, Ten Eyck & Root, for plaintiffs in error.*Merrill & Heald*, for defendant in error.

WINGARD, J. This was a civil action or proceeding to enforce specific performance under chapter 52 of the Code. The complaint or petition alleges that on or about April 13, 1869, L. P. Fuller and C. P. Ferry bound themselves by an instrument in writing to convey certain real estate in this territory to Joseph Buchtel, of which said real estate they were at that time owners in common. The instrument, which is made part of the complaint, is substantially as follows:

"Know all men by these presents, that we, L. C. Fuller and C. P. Ferry, are held and firmly bound unto Joseph Buchtel, of, etc., in the full penal sum of \$400, for the payment of which we bind ourselves jointly and severally, our heirs, executors, and administrators. The condition of this obligation is such that whereas, the said Fuller and Ferry have sold unto the said Buchtel ten acres of land at New Tacoma, in the county of Pierce, W. T.; and whereas, the said Buchtel has paid to said Fuller & Ferry, for said land, \$100, and agrees to pay as the purchase price thereof the further sum of \$100, if within five (5) years from the date of these presents a railroad company shall permanently locate a railroad running through or terminating at said Tacoma, which sum shall become due and payable immediately upon such location:

"Now, therefore, if, upon the payment by said Buchtel of said \$100, in case of the permanent location of a railroad as aforesaid within the time aforesaid, and as soon as such location is made, or upon such payment at any time prior to such location, or the expiration of said time, or, in case there shall be no such location of a railroad as aforesaid within said period, then, on demand of said Buchtel, without further payment, the said Fuller and Ferry shall make, and cause to be made, executed, and delivered to said Buchtel, his heirs, executors, administrators, and assigns, a good and sufficient conveyance of said lot of land near Tacoma, aforesaid, in fee-simple, free from incumbrances, and with the usual covenants of warranty, then this obligation to be void; otherwise, to be and remain in full force and virtue in law and equity."

The complaint further alleges that said Buchtel has performed all the conditions required of him; that he paid to said Ferry the further sum of \$100 on or about August 7, 1877; that after making said instrument, and before making a conveyance, the said Fuller removed from Washington Territory, and died in the state of Virginia; that on the ninth day of August, 1877, in accordance with the terms of the instrument aforesaid, the said Ferry made a deed of all his interest to said Buchtel, but that the said Fuller, his heirs, executors, or administrators, have not made, or caused to be made, any deed as required to said Buchtel.

The plaintiffs in error demurred to this complaint generally and specifically. The court overruled the demurrer, and the judgment overruling the demurrer is assigned as error.

It is patent upon this complaint that the action is barred by the statute of limitations. The bond or instrument was executed April, 13, 1869. No demand is alleged to have been made. The second \$100 was paid August 7, 1877, and suit was not commenced until April 18, 1884.

Let the judgment of the court below be reversed, and the cause remanded for further proceedings.

GREENE, C. J., and TURNER, J., concur.

(2 Wash. T. 360)

PARKER and another v. DENNY.¹

Filed July 23, 1885.

1. PRACTICE—APPEAL—NOTICE.

Where an appeal is prosecuted, notice to all necessary parties, both of the intention to appeal and of the appeal actually prosecuted, is necessary to confer jurisdiction.

2. SAME—TRANSCRIPT—CERTIFICATE.

Transcript on appeal must contain whole of the evidence in the case, and be certified as provided by section 451 of the Code.

A. E. Isham, for appellants, Hollen Parker and another.

Allen & Thompson, for appellee, Timothy P. Denny.

GREENE, C. J. This is a motion to dismiss the appeal. The cause was brought here under the appellatory provisions of the Code, by the appellant Hollen Parker. Two grounds for dismissal are urged: (1) That no notice of appeal, as required by section 454 of the Code, was ever served on John F. Boyer; (2) that there is nothing in the transcript to certify to this court that it has before it the whole of the evidence.

Both points we deem well taken. It was necessary and jurisdictional, for instituting this appeal, to make Boyer a party to it. Code, §§ 454, 455, 458; *Owings v. Kincannon*, 7 Pet. 399. But he could only be made a party by a voluntary joinder or appearance, or in the compulsory mode provided by statute. He has not appeared. A notice of intention to appeal was served on him, but no notice of the appeal actually prosecuted was ever given. He is not in court.

As to the other point, this court, following the case of *Coleman v. Yeisler*, 1 Wash. T. 591, has several times decided that the whole of the evidence should be certified in an appeal case. This court must have the cause in its entirety before it in order to proceed. Section 451 of the Code prescribes the form of certificate, and no certificate but the statutory one will avail. We cannot get jurisdiction by stipulation or estoppel or waiver. No statutory certificate is here. The motion is granted.

HOYT and TURNER, JJ., concur.

¹See 2 Pac. Rep. 351, and 7 Sup. Ct. Rep. 767.

(2 Wash. T. 439)

PARKER v. D'ACRES and others.

Filed August 4, 1885.

REAL ESTATE—MORTGAGE—FORECLOSURE—EQUITY OF REDEMPTION—STATUTE OF LIMITATIONS.

Under section 33 of the practice act of 1873 there is no equity of redemption in lands sold on foreclosure of mortgage. In this case it was also held that the statute of limitations intervened.

A. E. Isham, for appellant, Hollen Parker.

Allen, Thompson & Crowley and *B. L. & J. L. Sharpstein*, for appellees, George D'Acres and others.

TURNER, J. This is a suit in equity, brought by the appellant, as plaintiff, in the lower court to redeem property sold under a decree of the district court foreclosing a mortgage. The complaint alleges, in substance, that on the twenty-eighth day of December, 1874, and ever since, the appellant was the owner in fee of the property described in the complaint; that on the second day of January, 1875, said property was sold by the sheriff at public auction, under and by virtue of the decree of foreclosure, and that the same, in separate lots, was bought at said sale by the respective defendants, the complaint describing the particular part or parcel purchased by each defendant; that afterwards, and before the expiration of six months from the confirmation of said sale, the plaintiff, after giving the defendants due and legal notice that he would apply to redeem said property, tendered to the sheriff of Walla Walla county, in his office, during office hours, the amount of money necessary to redeem the same; that the said sheriff refused to receive the money so tendered, or to recognize the right of appellant to redeem said land, and that the appellant now brings into court and deposits with the clerk the amount of money so tendered to the sheriff; that the defendants wrongfully and unlawfully, on the second day of January, 1875, severally entered upon the premises purchased by them at the mortgage sale, and have ever since and now hold the same; that by reason of the wrongful refusal to permit appellant to redeem, and the unlawful deprivation of his possession by the defendants, he has been damaged in rents, issues, profits, etc.; that the defendants each hold deeds to the property purchased by them at the mortgage sale made to them by the sheriff of Walla Walla county, which deeds are of record, and are fraudulent and void.

The complaint prays that the deeds executed to the defendants by the sheriff be declared null and void; that the sheriff, as a commissioner of the district court, be required to make and deliver to plaintiff a good and sufficient deed to said property, and that plaintiff be let into possession of the same; that plaintiff have and recover damages for the unlawful detention of the possession of the property and for general relief.

The defendants demurred to the complaint because (1) it does

not state facts sufficient to constitute a cause of action; (2) several causes of action have been improperly united in the complaint. The lower court sustained the demurrer, and, the plaintiff declining to amend his complaint, brings the cause to this court by appeal.

The appellant bases his right to redeem the property upon the provisions of the civil practice act of 1873, c. 33, which governed his rights at the time of the mortgage sale, and of the offer to redeem. This chapter is substantially the same as chapter 34 of the Code of 1881, except that section 379 of the Code is not found in the law of 1873. The exclusion of the right to redeem from mortgage sales is made plain and unmistakable in the Code of 1881 by the addition of the last-named section. We think the same conclusion must be reached upon a consideration of the law of 1873, notwithstanding the absence of a provision analogous to that contained in section 379. Chapter 33 of the act of 1873 deals entirely with executions at law, and the right to redeem, granted by sections 364, 365, and 366 of that act, does not in terms, or by fair implication, extend to property sold in any other manner. The act explicitly defines what an execution shall be. Sections 321-323. This execution is entirely different from the order of sale issued by the clerk upon a decree of foreclosure. Section 565.

The conclusion that property sold under the decree of the district court to satisfy a mortgage is not subject to redemption under the act of 1873, is enforced by a consideration of the nature of mortgages under our system, and of the effect of our foreclosure proceeding. A mortgage of real property in this territory does no more than create a lien. In the apt language of a learned author: "The debt is the principal fact, and the mortgage is wholly incidental or collateral thereto, and intended to secure its payment. The right or interest of the mortgagee, from being a legal estate, is changed into an equitable right, enforceable by an equitable proceeding. It is, for all purposes and under all circumstances, personal assets. It may be assigned, and passes to the mortgagee's personal representatives on his death. * * * The mortgagee's interest being a mere lien, it is wholly destroyed, and the mortgagor's estate is left free and unincumbered by a payment of the debt secured by it at any time before the premises are actually sold under a decree of foreclosure." Pom. Eq. Jur. § 1188.

The proceeding to foreclose such a mortgage is entirely different from that to foreclose the equity of redemption, which, to meet the hardships of the common-law conception of a mortgage, was the creation of the courts of equity. Under our theory of a mortgage there is no such thing as an equity of redemption in the mortgagor. The legal title has never passed from him. The equity is in the mortgagee, and consists in his right to have the mortgaged property sold to secure the payment of the mortgage debt. This being so, a provision which permitted property sold under a decree of foreclosure to

be redeemed from the purchaser by the mortgagor within six months, would diminish the security which the mortgagee has by the terms of the mortgage for the payment of his debt. Property sold free from the right to redeem would ordinarily bring a better price than property sold subject to the right to redeem. It is not to be supposed that it was the intention of the law to alter the contract which the parties have made for themselves, and to impose an onerous condition upon one of them not provided in the contract, unless the language of the law is plain and conclusive. When the security is ample, no doubt a court of equity, by virtue of its inherent equitable power, may impose, as a condition of sale, the right of the mortgagor to redeem upon proper conditions within a certain time. But in the absence of any such condition in the decree of foreclosure the sale is absolute. The decree need not bar the equity of redemption, because there is no such thing. Whether or not it shall affirmatively provide for a redemption is a matter for the conscience of the chancellor upon a view of the facts of the case.

This view of the law is conclusive of this cause. The demurrer to the complaint was rightfully sustained.

The demurrer was properly sustained upon another ground. The cause of action, if any were in the plaintiff, accrued in the year 1875. The complaint in this case was not filed until May 15, 1884. The limitation for such an action is that provided by section 33 of the Code, and is two years. *Hubbell v. Sibley*, 50 N. Y. 468; *Miner v. Beekman*, 50 N. Y. 337.

The judgment of the court below is affirmed.

GREENE, C. J., and HOYT, J., concur.

(2 Wash. T. 461)

PAGE v. RODNEY.

Filed August 4, 1885.

PRACTICE—JURY TRIAL—APPEAL—NEW TRIAL.

The jury are the exclusive judges of the evidence, and only where there is an abuse of discretion on part of court below, or a great preponderance of evidence against the verdict, will the supreme court interfere.

Elwood Evans, for plaintiff in error.

J. M. Ashton, for defendant in error.

WINGARD, J. This is a suit at law, in which the plaintiff in error, who was defendant below, seeks to reverse a judgment of the district court, and secure a new trial. The substantial error complained of is overruling the motion of plaintiff in error for a new trial, upon causes in said motion alleged.

Juries are the exclusive judges of the facts adduced in evidence before them at the trial; and, while judges before whom a cause is tried would sometimes return a different verdict from that found by the jury, were it their province to do so, it is no abuse of discretion in all such

cases to refuse a new trial. As early as 1855 this court held that nothing but an abuse of discretion on the part of the court, or a great preponderance of evidence against the verdict, will cause this court to interfere, (*Gove v. Moses*, 1 Wash. T. 9,) and the principle of this decision has since been adhered to. *Phelps v. Steam-ship City of Panama*, Id. 544, 570, 588; *State of Nevada v. Jones*, 5 Nev. 415.

The record in this case discloses a conflict of evidence, and we cannot say that the court erred in refusing a new trial. The affidavit purporting to set up after-discovered evidence affords no grounds for a new trial.

Let the judgment of the court below be affirmed.

GREENE, C. J., and TURNER, J., concur.

(2 Wash. T. 347)

BUDD and another v. WALLA WALLA PRINT. & PUB. Co.

Filed July 24, 1885.

1. CORPORATIONS—MEETING OF TRUSTEES—PRESIDENT ACTING AS SECRETARY.
The person who presides over a meeting of the board of trustees of a corporation may also be the clerk of the meeting.

2. SAME—REGULARITY.

To be valid, a meeting of the board of trustees must be a stated meeting, or one regularly and properly called; and when the meeting is not a stated meeting, it is not essential that proof or recital of notice appear on the face of the record of the proceedings; it may be shown *alibunde*.

3. SAME—TRUSTEE MAY CONTRACT WITH.

In the absence of any statute prohibiting, a trustee may legally contract with the corporation through its proper officers, if he does so openly and fairly.

B. L. & J. L. Sharpstein, for appellants, *J. E. Budd and another*.
A. E. Isham, for appellee, *Walla Walla Printing & Publishing Co.*

GREENE, C. J. According to the transcript, the cause now before us for review was begun by appellants in the district court on the twenty-sixth of May, 1883, to recover from appellee, which is a corporation, the amount of a warrant issued by the corporation through its president on the twenty-eighth of April, 1883, and payable to appellants or their order. For payment, the warrant was on the day of its issue presented to the treasurer of defendant, and by him accepted, but owing to lack of funds not paid. Refusal to pay occasioned the suit.

It appears from an allegation of the answer, undenied by the reply, that at, and for a long time before, the issuance of the warrant the affairs of the corporation were managed by a board of five trustees, of whom one of the plaintiffs was one.

Eventually the cause came to trial upon issues duly framed as to whether or not the corporation issued the warrant, and whether the warrant was not, as against the defendant, fraudulent and void. Nothing is alleged in the pleadings as to any ratification of the warrant. Defendant's by-laws and the warrant were offered in evidence

on the trial by plaintiffs, and were without objection admitted. On admission of these, plaintiffs next offered the proceedings of a meeting of the trustees held on the twenty-third of April, 1883, which proceedings included a resolution then passed by the board, and purporting to authorize the issuance of the warrant. From the face of the proposed evidence it was apparent that the same person acted both as president and as secretary of the meeting; that four of the five trustees were present; that the resolution passed unanimously; and that the plaintiff trustee was present and voted for its passage; but there was nothing to show that the meeting was a stated meeting, or was called pursuant to any notice.

To the admission of this evidence defendant objected, (1) because the president acted also as secretary of the meeting; (2) because the plaintiff trustee was present and voting; and (3) because no notice of the meeting appeared.

Holding with the defendant as to one or more of the points made, the judge sustained the objection and excluded the evidence. Exception was duly taken by plaintiffs and allowed by the court. Without tendering more evidence, plaintiffs then rested. On this, the court, at defendant's request, instructed the jury that the warrant was void for the reason that one of the plaintiffs was a trustee when it was issued, and could not contract with himself. Reasoning thus, the court proceeded further to instruct the jury to find for the defendant, to which instruction and the other instruction plaintiffs duly saved exceptions. Left without option, the jury, of course, returned a verdict for defendant, and this verdict the plaintiff in vain endeavored by a motion for new trial to set aside. Defendant followed up his verdict by taking the judgment, from which the plaintiffs, under the act of 1883, have sued this appeal.

In view of these occurrences in the lower court, the soundness of the judgment is conceded to depend upon the correctness of the ruling of the judge upon the admissibility of the evidence offered and rejected. Simply because the chairman of the meeting of the board of trustees acted also as its scribe would, in our opinion, operate to invalidate neither the action of the meeting nor the minutes of that action as taken down and recorded by him. There has been no authority cited bearing on the point, and perhaps there is none that could be.

How the duty of mere moderator can conflict with the duty of mere clerk, save in the matter of dispatch of business,—a matter which must be determined by the meeting such officers serve,—or how the one officer can be a check upon the other, is not easy for us to see. Every assembly, in the absence of its regular secretary, must decide for itself whether its minutes shall be kept by a person other than its presiding officer, who may be the fittest or only fit person present to act as scribe. Even though the president and secretary be charged by statute with incompatible functions, the former officer would not

thereby be prevented, in the absence of the latter, from accepting and discharging, *pro tempore*, for the latter a function not incompatible. No force, therefore, we think, should be attributed to the first ground of objection to the proffered evidence.

Every meeting of board of trustees, to be valid, must, no doubt, be regular meetings; that is to say, cannot be valid unless they be stated meetings, or meetings called pursuant to authoritative notice; yet it does not follow that, where the meeting is not a stated one, proof or recital of notice must appear on the face of the record of proceedings. Our opinion is that any needed proof of the regularity of the meeting might be supplied *aliunde*, and that until the contrary appeared the proceedings would be presumed regular. *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *Railway Co. v. McCarthy*, 96 U. S. 258; *Gelpcke v. City of Dubuque*, 1 Wall. 221.

From these points, therefore, we pass to the main questions, whether the simple fact of the plaintiff being trustee, or the more complex fact of his presence and action at the meeting, would render the apparent corporate action void. Giving his vote was a formal, but not a substantial, participation in the doings of the board. On the business in hand he had no power to pass, and therefore his seeming exercise of power cannot be considered as real or effective. Doubtless, in the absence of statute to the contrary, the corporation could contract with him, for its interest might lie that way. Admitting this, it would seem to follow that he could treat with the corporation through its proper business functionaries, the trustees other than himself, doing it in a fair and open-handed manner, and he could appear before them in his own interest, and in good faith press them to comply with his desires or necessities. More than this, we are not at liberty to presume that the plaintiff trustee did. Every case may, indeed, suggest suspicion of fraud, and in a particular case fraud may perhaps be establishable by proof; but a court will always regard a transaction as honest until, by competent evidence, it is shown to be otherwise. No evidence sufficient to prove fraud got before the court on the trial of this cause, and, even if it had, the office of passing upon its sufficiency would have fallen to the jury.

As to these main questions the authorities are somewhat divergent, but the weight of them and the better reason accord with our views. Most of the decisions that seem to favor a contrary doctrine are controlled by statutory provisions, or are based upon circumstances displaying actual or constructive fraud. Enough books to show the reasoning and attitude of the courts in the premises are cited when we name the following: *Ang. & A. Corp.* (8th Ed.) § 233 and citations; *Rolling Stock Co. v. Railroad Co.* 34 Ohio St. 450; *Hallam v. Indianola H. Co.* 56 Iowa, 178; S. C. 9 N. W. Rep. 111; *Neall v. Hill*, 16 Cal. 146; *Smith v. Skeary*, 47 Conn. 47; *Duncomb v. New York, H. & N. R. Co.* 88 N. Y. 1; *Leavitt v. Oxford & G. S. Min. Co.* 1 Pac. Rep. 356; *Sutter St. R. Co. v. Baum*, 4 Pac. Rep. 916; *Twin-Lick O.*

Co. v. Marbury, 91 U. S. 587; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322; S. C. 5 Sup. Ct. Rep. 525.

Nothing remains but to add that the judgment of the district court must be reversed, and the cause remanded for a new trial.

HOYT and TURNER, JJ., concur.

(2 Wash. T. 485)

LEMON and another v. WATERMAN and another.

Filed August 4, 1885.

1. HUSBAND AND WIFE—EXEMPTION—STATUTORY CONSTRUCTION.

Under section 252 of the civil practice act of 1854, the interest of the husband in the separate estate of a married woman was held free from execution to pay husband's debts. Sections 3, 4, and 5 of the act of 1869 affect only such property as the wife has acquired since the passage of that act.

2. REAL ESTATE—CLOUD UPON TITLE—PRACTICE.

Complaint considered, and held sufficient.

C. W. Hartman, for appellants, William Lemon and another.

McNaught, Ferry, McNaught & Mitchell, for appellees, S. Waterman and another.

TURNER, J. This is a suit in equity to remove a cloud from the title to certain real property in the city of Olympia, described in the complaint. It was heard in the court below upon the pleadings and the evidence, and after hearing the judgment was that the complaint be dismissed. The plaintiff prosecutes an appeal to this court.

The principal question for our determination arises upon the findings of the court below, and it is unnecessary to notice the pleadings except in a particular to be hereafter mentioned. Some question is made by the appellees as to some of the findings of fact, but after a careful scrutiny of the evidence we think the findings substantially correct.

The second and third findings were in substance as follows:

(2) That on the second day of February, 1867, Philip D. Moore and Phoebe H. Moore were husband and wife; that on said day Phoebe H. Moore received from William Cook and wife a deed or conveyance to a lot or tract of land which included the property described in the complaint, which tract of land then became the separate estate of said Phoebe H. Moore.

(3) That on the eighteenth and twenty-seventh days of December, 1883, by good and sufficient conveyance, the property described in the complaint was conveyed to the plaintiffs by said Philip D. Moore and said Phoebe H. Moore.

The fourth finding, to which the foregoing are but explanatory, and upon which the question in the case arises, was as follows:

"That said Phoebe H. Moore was, on the twenty-fourth day of April, 1876, the wife of Philip D. Moore, and had not, nor has ever, caused to be recorded, as required by law, an inventory of her separate estate, including the lots and lands hereinbefore described, in the office of the auditor of Thurston county, and on said day the said sheriff of Thurston county, Washington Territory, sold all the right, title, and interest of Philip D. Moore in said lands to de-

fendants herein, under and by virtue of an execution upon a judgment against said Philip D. Moore upon a debt contracted by said Philip D. Moore in the year 1874. That thereafter said sheriff duly executed a deed of said interest to defendants, who had caused the same to be recorded in the office of the county auditor of said Thurston county, at pages 184 and 185 of volume 13, Deeds. That said lands, at the commencement of this action, were vacant and unoccupied, and the said deed now remains of record in said office, and is regular in form upon its face, and the defendants are the owners of an estate in the said lands by virtue of the said sheriff's sale and deed."

Under the common law, which regulated the subject in this territory at the time Phoebe H. Moore acquired the lands in controversy, her husband was vested with a freehold estate in the lands for their joint lives, and, upon the birth of a child during coverture, with a freehold estate for his own life. This estate might be levied on and sold on execution at the common law for the husband's debts. Schouler, *Husb. & W.* §§ 167, 168, and authorities there cited; *Starr v. Hamilton*, Deady, C. C. 268. But at the time this property was conveyed to Mrs. Moore the common law, as stated above, had been modified by statute in this territory.

In the civil practice act, passed April 28, 1854, (Laws Wash. T. 1854-1856, p. 129.) it was declared:

"Sec. 252. All real and personal estate to which any married woman shall hereafter become entitled to in her own right, and all which may at the time of her marriage belong to her, and all the issues, rents, and profits of such real estate, shall not be liable to attachment for, or execution upon, any liability or judgment against her husband so long as she, or any minor heir of her body, shall be living: provided, that her separate property shall not be exempt from attachment or execution where the debts were owing by the wife previous to marriage, or may have been contracted for her benefit."

This law has been re-enacted in each of the several revisions of the laws of this territory, and may now be found as section 341, Code 1881.

It is insisted by the appellants that this provision of our statutes was intended to make the property of the wife, owned or acquired by her as defined by the statute, her separate property, as that term was understood at common law, and free from the marital rights of the husband. A somewhat similar provision in the constitution of Oregon has been given this meaning by the supreme court of Oregon. *Brummet v. Weaver*, 2 Or. 168. This construction was followed and its reasoning elaborated by DEADY, district judge, in *Starr v. Hamilton*, Deady, C. C. 268.

We think, however, the better opinion in the construction of our statute is that it creates an exemption of the husband's estate in the wife's property in favor of the wife. The provision is found both in the civil practice act of 1854 and in the Code of 1881, in the chapter relating to exemptions, and under the title "Exemptions." It does not in terms do more than create an exemption, and no good reason exists for extending its import beyond its terms. An exemption of one person's property in favor of a different person is an anomaly,

but when the peculiar estate of a husband at common law in property acquired by the wife is considered, and the reasons of the law for creating such estate, the exemption will be seen to be an eminently just one, and one bearing a useful and perfectly consistent part in the scheme of the law. The modification, then, in the common law made by our statutes, at the time of the acquisition of this property by Mrs. Moore, was to exempt the estate of the husband therein from seizure and sale on execution for the husband's debts.

Did the fact, as found by the court, that Mrs. Moore had failed to record an inventory of her separate estate prior to the levy of execution by the sheriff upon this property, divest her of the right to insist upon this exemption? The lower court so found, and rendered judgment accordingly. The law concerning the estate of the husband in the wife's property remained in this territory, as heretofore stated, until the passage of the act approved December 2, 1869, entitled "An act defining the rights of husband and wife." Laws Wash. T. 1869-1871, p. 318. This act established the system of community property between husband and wife, the incidents of which are well known to the bar and the public. It is hardly necessary to say that this act, whatever its terms, did not operate to divest the estate of either the husband or the wife in property held by them, or either of them, at the time of its passage. But there are provisions in the act which, it is claimed, have the effect of requiring the wife to do certain things, if she would insist on the exemption in her favor made by the act of 1854, and which cuts off said exemption if she fail to do them. Section 3 of the act requires the wife to make a full and complete inventory of her separate property, and to acknowledge and record said inventory in a manner pointed out by said section. Section 5 provides:

"The filing of any such inventory in the auditor's office shall be notice of the title of the wife; and all property belonging to her included in the inventory, as well as any money in specie not so included, shall be exempt from seizure on execution for the debts of the husband, and she shall be deemed to have waived the exemption from such seizure on execution of all property belonging to her not included in any such inventory, other than money in specie."

We think these provisions must be construed as having reference only to property to be affected by the community system which the act of the legislature brought into existence, and hence as having no reference to property held by the wife in her own right before the passage of that act. The system was not a new or untried one. It had been in existence for many years in California, Texas, and Louisiana. Its weakness and its strength were known. The right of husband and wife under it, and of creditors of one or both, had been discussed and determined by the courts. We may well conclude that the provisions of the system in question were intended to have a specific application to property to be affected by the system, if we can

find a useful purpose in connection with that system to which they may be applied.

It is settled by the courts in construing the community property law that property acquired by the wife during coverture, the title to which is taken in her name, is *prima facie* common property, and therefore subject to the husband's community debts. This presumption may be rebutted by the wife, who may show the true nature of her title. It will be readily seen that a wide door is thus thrown open for fraud upon creditors, to say nothing of the field left for future litigation between heirs, devisees, and assignees, claiming adversely under the husband or wife. Sections 3, 4, and 5 of this act, we think, were intended to close this door. It was competent for the legislature, as to after-acquired property, to give full effect to the presumption that such property, even though title to it were taken in the name of the wife, was community property, unless the wife gave the public notice of her separate title. It was not competent for the legislature to attach such presumption to property acquired by the wife before the passage of the act, her enjoyment of which, with all the incidents thereof provided by law at the time of its acquisition, is preserved by constitutional guaranties. Section 5 of the act of 1869 cannot be construed, when read in connection with the other provisions of that act, as a mere exemption from sale, in favor of the wife, of the estate of the husband in the wife's property, as in the act of 1854. The act of 1869 destroys that estate. Therefore, if said act has a retroactive effect, it permits the wife's property to be sold for the husband's debts.

As before stated, this might be permitted as to property acquired by the wife after the passage of the act of 1869, and not inventoried by her, but it could not be permitted as to property held by her before the passage of that act. Our conclusion is that full effect must be given in this case to the exemption provided by the act of 1854, regardless of the failure of the wife to make and record an inventory of her property; and the failure upon the part of Mrs. Phoebe H. Moore to make and file such inventory, as found by the court below, did not bar the plaintiffs from the relief prayed in the complaint. The defendants took no interest in the lands in controversy by virtue of the conveyance from the sheriff.

The appellees insist, however, that the complaint does not state facts sufficient to constitute a cause of action, and that the judgment of dismissal was correct on that ground. The complaint sets up the sheriff's deed to appellees, alleges that the same is a cloud upon the plaintiff's title, and prays that the same may be declared void and of no effect. We have seen that the appellees took no interest by virtue of the sheriff's deed, and that the same was null and void. This being so, there is no cloud upon the plaintiff's title, according to the principles of equity, and the complaint fails to state a cause of action. 3 Pom. Eq. Jur. § 1399, and authorities cited.

Appellants rely upon section 551 of the Code as enlarging the equity jurisdiction in such cases. That section provides, among other things, that when "real property is not in the actual possession of any one, any person, or private or municipal corporation, claiming title to any real property under a patent from the United States, or during his or its claim of title to such real property under a patent from the United States for such real estate, may maintain a civil action against any person or persons, corporation or association, claiming an interest in said real property, or any part thereof, or of any right thereto adverse to him, them, or it, for the purpose of determining such claim, estate, or interest." We think the statute must be given the effect claimed for it, and that where the property is not in the actual possession of any one, as in this case, the jurisdiction of the court can be maintained, notwithstanding the absolute invalidity of the claim or estate against which the true owner is moving. In this case the complaint does not show that the appellees are claiming the property under their void conveyance. The evidence, however, shows that fact, and we think the appellants should now be permitted to amend the complaint to correspond with the evidence in this respect.

The judgment of the lower court is reversed and the cause remanded, with directions to permit an amendment of the complaint, and to then proceed to judgment in accordance with this opinion.

GREENE, C. J., and WINGARD, J., concur.

(2 Wash. T. 433)

MERCHANT and others v. HUMESTON and others.

Filed August 4, 1885.

1. MECHANIC'S LIEN—NOTICE—STATUTORY REQUISITES.

Where the notice or statement of the demand for a mechanic's lien substitutes the words "over and above all credits and effects" for the words "over and above all credits and offsets" mentioned in the statute, *held* a substantial compliance with the statute.

2. SAME—DESCRIPTION—SUFFICIENCY OF.

The notice must fully and specifically set out the labor performed and material furnished for each particular building, and particularly describe the lot or tract of land upon which such building was erected. Where seven houses were erected upon as many lots and a lien claimed upon all and each of them for an unpaid balance, without setting out the material that enters into each particular structure, *held* fatally defective.

A. L. Palmer, for plaintiff in error.

Burk & Haller and *C. H. Hanford*, for defendant in error.

HOYT, J. This action was brought to foreclose four certain liens for labor done and materials furnished in the construction of seven houses, situated on lots 5 and 6, in block 39, in Maynard's plat, in Seattle. The court below sustained a demurrer to the complaint on the ground that the notices of liens set out therein were, and each of them was, insufficient and void, and the plaintiff has brought the

cause here by appeal, to correct the ruling of the court on said demurrer.

The appellees, to sustain the action of the lower court, rely upon two specifications of the insufficiency of said lien notice: *First*, that the statement of the demand for which lien is claimed is not sufficient, because in the statement thereof the lien has substituted for the words "over and above all credits and offsets," mentioned in the statute, the words "over and above all credits and effects;" but we are of the opinion that if we apply the liberal rule of construction invoked by the legislature as to this lien law, we can either substitute for said word "effects," in said notice, the proper word "offsets," or that the expression "over and above all credits," taken in connection with the other allegations of these notices, is a substantial compliance with the statute without the addition of the words "or offsets." We therefore think that this statement in these notices was sufficient. The other alleged defect in these notices is that there is no sufficient description of the property to entitle said liens to be enforced as against the defendants who appeared in the cause, who were incumbrancers of the property against which said lienors were seeking to enforce their liens.

The notices were not exactly alike, and if we find any of them sufficient the demurrer must be overruled. We will therefore investigate that of Ballard & Sox, which was conceded on the argument to be the best one of the four. This notice sets out that they furnished materials used in the construction of seven certain dwelling-houses situated on said lots 5 and 6, upon which there was due and unpaid the sum of \$79.56, and claims a lien therefor "in the proportion aforesaid," to-wit, \$12.74, upon each of the seven houses; the words "proportion aforesaid" having, however, nothing in the notice upon which it could be predicated, unless it was the statement that the said seven houses were of about the same size. And there is nowhere in said notice an allegation that of the materials furnished \$12.74 worth, or any other certain amount, went into any particular one of said houses, excepting a repetition towards the close thereof of the words "in the proportion aforesaid." And we do not think this loose statement sufficient to show that of the said materials any particular amount went into any one of said houses, and without such an allegation there is no foundation for the claim of lien. In order to make said lien claim of \$12.74 enforceable against any or each of said houses, it should, at least, appear by direct averment that that particular amount of material had gone into the particular house in question, and was unpaid for, and that a lien was claimed therefor, and should further contain a description of the property upon which such house was situated sufficient for identification; and to say that a particular house is one of seven, all of which are situated on two certain lots, is no designation at all as to the location of said particular house, as there is nothing tending even to show as to which

of said two lots it is upon. If the claimant had set out in his notice that he furnished said material as a single transaction for the building of the seven houses, and that they were all built as substantially one building, and claimed a lien on the whole thereof for his entire claim, a different question would have been presented; but he saw fit to claim seven distinct liens of \$12.74 each, and in order to sustain such lien on any one house there must be such direct averments as would make such claim good if it stood alone, unconnected with the claims against the other houses. Of course some of the statements could be grouped, but it must clearly appear that the lien for the sum of \$12.74 claimed upon any one house is for that amount of unpaid-for materials used in the construction thereof, and said notice must further contain a definite description of that particular house, so as to identify it, not only with all the others, but also from all the others. We have already seen that the most liberal construction of this notice will fail to make of any averment therein, even substantially, a statement of these necessary facts. It follows that the notices were void, and that the action of the court in sustaining the demurrer to the complaint was correct, and that the decree rendered thereon must be affirmed; and it is so ordered.

WINGARD and TURNER, JJ., concur.

SUPREME COURT OF CALIFORNIA.

(67 Cal. 444)

Estate of DALRYMPLE, Deceased. (No. 8,872.)

Filed September 18, 1885.

1. WILL—CONTEST, PARTIES TO.

In a contested will case, the contestants are the plaintiffs, and the petitioners for probate the defendants, under the California statute. Code Civil Proc. §§ 607, 1312.

2. VERDICT—CONFLICT OF EVIDENCE.

Where there is a conflict of evidence, the verdict of a jury will not be disturbed.

3. CONTEST OF WILL—TESTATOR'S MENTAL CONDITION, EVIDENCE OF.

Where insanity of testator is alleged, and the disease causing his insanity was a progressive one, a witness may testify as to the condition of testator's mind at a period prior to the execution of the will.

4. SUBMISSION OF ISSUES TO JURY, WAIVER OF—FINDINGS.

Where, on the contest of probate of a will, the contestants neglect to submit issues to the jury, they waive their right to do so, and it then becomes the duty of the court to find on such issues.

Commissioners' decision.

Department 2. Appeal from superior court, Marin county.

H. D. Gough and *L. Quint*, for appellants.

W. H. Tompkins and *Flournoy, Mhoon & Flournoy*, for respondent.

FOOTE, C. The tenth and eleventh issues allowed to be tried by the jury in this, a case of the contested probate of a will, were not in themselves improper, under the rule laid down in the *Gharky Case*, 57 Cal. 274. The contestants claimed those issues to be substantially a repetition of the seventh and eighth tendered by them, and allowed by the court, and that those last, wherein the jury found against them, were the true issues upon the matters to which they related. If this be true, contestants cannot complain, since the finding of the jury upon those issues supports *pro tanto* the order or decree made and entered by the court.

There can be no reasonable ground to doubt that sections 607, 1312, subd. 4, Code Civil Proc., as construed in *Estate of Collins*, Myr. Prob. 73, constituted "on the trial the contestants plaintiffs, and the petitioner defendant." The reason there given, that the matter is entirely controlled by the statute, seems to be conclusive. The court rightfully said, "as to all matters involved in the issues raised by the contest, the contestant is plaintiff, and must go forward." The evidence submitted to the jury being conflicting upon all the material issues, their verdict should be upheld.

Objection is urged to the competency of the testimony of various witnesses for the proponent. It is claimed that, not being experts, they should have established their intimacy with the testator, and, before being permitted to testify as to their opinions of his sanity or insanity, should have stated the reasons therefor. The testimony as delivered by the witnesses appears to have made evident the inti-

macy required, and to have included the reasons for their opinions.

The objection that the witnesses testified to the condition of mind of the testator at times too remote from that of the execution of the will is not tenable. The disease causing his insanity was a progressive one.

The court committed no error in admitting or excluding any of the evidence offered. Section 1870, subd. 10, Code Civil. Proc.; *People v. Sanford*, 43 Cal. 33; *Estate of Toomes*, 54 Cal. 509.

The law as contained in the instructions given by the court to the jury, and allowed to go to them as requested by counsel, is properly stated. The modifications of instructions made were correct, as was also the refusal of certain of them. That tribunal seems to have had in view, in its action in the premises, the law as laid down in the *Gharky Case*, 57 Cal. 274, and *Estate of Low*, Myr. Prob. 147; and applied the correct principles therein stated to the facts of the case at bar.

There was no question of marriage involved in the contention, and the jury were not misled, but disabused of any wrong impression which they might otherwise have had from the proposed instruction asked by contestants on that subject and refused orally in their presence by the court, as also from the testimony on that point by Mr. Gough.

The conduct of the court in studiously keeping the jury upon the beaten track as to the issues to be by them tried, is to be commended. Its action in finally making and entering its order or decree without allowing the contestants, at the time proposed by them, to have the issue tried, whether or not the death of the testator had been the result of the illness under which he suffered at the time of the execution of the will, was proper. The testimony was ample to support the finding of the court upon that point; and the contestants, by not including it among the issues they first submitted to the jury, and upon which the jury found, waived such right, and it then became the duty of the court to consider the evidence, and make a finding thereon. The province of the court and jury in such case is stated in *Estate of Collins*, *supra*:

"The theory of this statute seems to be as follows: A paper is offered as a will; it is contested on any one or more of the statutory grounds; a jury is sworn to try the issues raised by the contest, not to pass upon any other fact. Upon those issues the contestant is plaintiff. It may happen that a contest is raised as to one only of the statutory grounds; for instance, say not witnessed. That issue is the only one before the jury, and their verdict will be conclusive upon it. But upon the rendering of the verdict upon that issue the court could not admit the will to probate. The court, not the jury, will hear evidence on all the points required by the statute, not raised by the contest, and admit or reject."

The order of the court admitting the will to probate and appointing Peter Alferitz administrator, etc., and that denying a new trial, ought to be affirmed.

We concur: **BELOHER, C. C.; SEARLS, C.**

By THE COURT. For the reasons given in the foregoing opinion the orders are affirmed.

(67 Cal. 296)

ZELLERBACH v. ALLENBERG and others. (No. 9,781.)

Filed August 17, 1885.

JUDGMENTS—WHEN SET ASIDE FOR FRAUD.

Judgments will not be set aside on the ground of fraud, unless such fraud was practiced in the very act of obtaining the judgment, without any default of the party against whom the judgment was rendered, or of his counsel.

Department 2. Appeal from superior court, Sierra county.

R. H. Taylor and T. M. Osment, for appellant.

Jarboe & Harrison, for respondents.

MYRICK, J. The complaint in this case was filed to set aside, on the ground of fraud, a judgment which had been obtained by Allenberg and Goldstein against Zellerbach. In the court below, judgment on demurrer was rendered for the defendants. The case as presented by the plaintiff herein, why the judgment in the former case should be set aside, is substantially as follows: Allenberg and Goldstein commenced an action against Zellerbach to foreclose a mortgage executed by the latter to Allenberg. In the complaint in that case it was alleged that the mortgage was given to secure the payment of a note for \$50,000 and interest, executed by Zellerbach to Goldstein, an indebtedness of Zellerbach to Allenberg of \$9,000 and interest, and advances and loans to be made by Allenberg to Zellerbach. It was also alleged that Allenberg paid out \$25,000 in excess of issues, in the management of the mortgaged property. The mortgaged property consisted of several mines and ditches, and appurtenances, embracing all the property of Zellerbach in the county, together with 30,000 shares in a mining company and 1,000 shares in a canal company. Zellerbach, in his complaint in this case, avers that in his answer in the former case he admitted the making of the note and the indebtedness to Goldstein, but claimed that Allenberg had received \$14,000 for dividends on the canal company stock and \$1,500 cash. The court, in that action, found that Zellerbach was indebted, on the obligations alleged in the complaint therein, in the sum of \$91,474.15, and that Allenberg had paid out \$11,251.41 in the management of the property, and rendered judgment of foreclosure and sale. The plaintiff, Zellerbach, then proceeded in his complaint in this action to aver that he was extensively engaged in business; that Allenberg was his confidential agent and manager of his business, having almost exclusive control thereof; that Allenberg represented to plaintiff that money was needed to carry on the business, and that Goldstein had money to loan; that, acting solely on the representations of Allenberg, he drew on Goldstein for \$30,000, which was paid; that Allenberg handed plaintiff \$7,853.15, representing it to be a loan from Goldstein, and that the \$50,000 note was given for

these sums and interest thereon; that at the time he gave the note, and when the decree was rendered in the former action, he believed he was indebted to Goldstein in the sum named in the note, less the credits claimed, but that since the date of that decree he had been informed and believed, and therefore alleged, on information and belief, that the sums supposed by him to have been loaned to him were, in fact, moneys which Allenberg had abstracted from him in the management of the business, and induced (by collusion with Goldstein) plaintiff to believe was the money of Goldstein, and was, in truth, the property of plaintiff.

It will be observed that the plaintiff in this action does not aver that Allenberg or Goldstein, by any act, prevented him from ascertaining, before he executed the note, the true condition of his affairs; neither does he aver that he could not, with the ordinary prudence of a business man, have ascertained such condition. For aught that appears he might have examined his books and accounts then; and he might have examined them at any time before the trial of the former case.

If it be true that Allenberg falsely abstracted the plaintiff's funds, and by collusion with Goldstein loaned them to plaintiff, it does not appear but that plaintiff might, with reasonable attention to his business, have ascertained the fact, and made the defense in the former action. It is not enough for the purposes of this action that he should have been ignorant of the alleged wrong at the time of the former trial. That ignorance must have been caused by the acts of Allenberg or Goldstein, or by his own misfortune which reasonable prudence would not have guarded against. He does not aver that Allenberg had the entire management of the business, or that he made false entries in the books, or prevented inquiry or examination; nor does he aver any fact tending to show that Allenberg or Goldstein prevented him from making a defense, nor from ascertaining the facts necessary to the defense. Where a judgment is attacked and sought to be set aside for fraud, the "fraud must have been practiced in the very act of obtaining the judgment, or else it will be concluded by the judgment at law, where fraud is equally a defense as in equity." 2 Story, Eq. Jur. 1575.

"The rule of the best considered and more recent cases upon the subject is that the party must have failed in obtaining redress in the suit at law by the fraud of the opposite party, or inevitable accident or mistake, without any default either of the party or his counsel." 2 Story, Eq. Jur. 1574, note; *French v. Garner*, 7 Port. (Ala.) 549; *Ede v. Hazen*, 61 Cal. 360; *Weir v. Vail*, 4 Pac. Rep. 422; *U. S. v. Throckmorton*, 98 U. S. 61.

We think the judgment of the court below in this case is correct; it is therefore affirmed.

We concur: MORRISON, C. J.; THORNTON, J.

(67 Cal. 453)

DALZELL v. SUPERIOR COURT OF SAN BENITO CO. (No. 11,217.)

Filed September 23, 1885.

1. NOTICE OF APPEAL—PROOF OF SERVICE.

Where the record of a case on appeal from a justice's court is silent as to the service of the notice of appeal, the fact of service may be proved by affidavit; but the affidavit must show that all the requirements of the law to effect service were complied with.

2. SERVICE OF NOTICE OF APPEAL—SUFFICIENCY OF.

Under the California statute (Code Civil Proc. § 1011) service of a notice of appeal may be made "in the absence of the attorney from his office, if his office be open, by leaving the notice * * * between the hours of 8 A. M. and 6 P. M. in a conspicuous place in the office;" but this provision is not sufficiently complied with, nor is the service sufficiently proved, by an affidavit of service which states that the notice was "left on the desk of said attorney, in the front room of his law-office, between the hours of 8 A. M. and 6 P. M., and that there was no person in said front room of said office at the time said notice of appeal was left there," as the absence of the attorney cannot be deduced from the fact of his absence from the front room of his office.

3. SAME—DEFECTIVE SERVICE—JURISDICTION—DISMISSAL.

Service of notice of an appeal is a jurisdictional fact; and if service has not been made within statutory time, and according to the requirements of the statute, to effect service, the appellate court derives from the notice no actual jurisdiction of the case, and the appeal is dismissible *ex mero motu*, or on motion of respondent, for want of jurisdiction.

Department 1. Application for writ of review.

Montgomery & Scott and N. C. Briggs, for petitioners.

McCroskey & Hudner, for respondent.

McKEE, J. It appears from the allegations of the petition that the superior court of San Benito county, upon the hearing of a motion to dismiss an appeal taken from a judgment rendered by a justice's court, finding that there was no service of the notice of appeal to give the court actual jurisdiction of the case, ordered a dismissal of the appeal; and it is contended that this order was in excess of the jurisdiction of the court, and void, because service of the notice of appeal as prescribed by law was substantially proved upon the hearing of the motion to dismiss. The papers in the case transmitted by the justice to the superior court did not show any service whatever; but, pending the motion made to dismiss the appeal on that ground, appellant's attorney filed an affidavit upon which it was claimed that service of the notice of appeal had been made upon the attorney of the adverse party during his absence from his office. Where the record of a case on appeal from justice's court is silent as to service of the notice of appeal, the fact of service may be proved by affidavit; but the affidavit must show that all the requirements of the law to effect service were complied with. *Mendioca v. Orr*, 16 Cal. 368; *Doll v. Smith*, 32 Cal. 476. Service is effected by personal delivery of a copy of the notice to the adverse party or his attorney; or it may be made during the absence of the attorney from his office, if the office be open, by leaving the notice * * * with his clerk, or other person in charge of the office; or, if there is no person in the office, by leaving it, between the hours of 8 in the morning and 6

in the afternoon, in a conspicuous place in the office, etc. Sub. 1, § 1011, Code Civil Proc.

The affidavit of service states that the notice of appeal was served on the attorney for respondent "by leaving it on the desk of the said attorney, in the front room of his law-office, * * * between the hours of 8 in the morning and 6 in the afternoon of the sixth of June, 1885, * * *" and "that there was no person in *said front room* of said office at the time said notice of appeal was left there," etc. This was insufficient to show constructive service of the notice upon an attorney absent from his office. Taking as incontrovertible the fact that the attorney upon whom service was attempted to be made was not in the *front room* of his office at the time, his absence from his office is not deducible from the fact. It is not claimed that "the attorney of respondent" got the notice. In fact, the affidavit states the attorney complained that "he would not have known that an appeal had been taken if he had not seen it in the newspapers." The proof of service was therefore legally insufficient and the court did not exceed its jurisdiction in so determining, and in ordering a dismissal of the appeal. Service of notice of an appeal is a jurisdictional fact; and if service has not been made within statutory time, and according to the requirements of the statute, to effect service, the appellate court derives from the notice no actual jurisdiction of the case, and the appeal is dismissible *ex mero motu*, or on motion of respondent, for want of jurisdiction. *Coker v. Colusa Co. Super. Ct.* 58 Cal. 177; *Trobock v. Caro*, 60 Cal. 304.

Application for writ denied.

We concur: ROSS, J.; MCKINSTRY, J.

END OF VOLUME 7.

